Supreme Court, U. S.
FILED
DEC 31 1975
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-9291

* * *

W. J. ESTELLE, JR., RALPH GRAY,
AND H. H. HUSBANDS,
Petitioners

V.

J. W. GAMBLE,
Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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V.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioners, W. J. Estelle, Jr., Ralph Gray and H. H. Husbands, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 4, 1975.

OPINION BELOW

The opinion of the Court of Appeals, *Gamble v. Estelle*, 516 F.2d 937 (5th Cir. 1975) appears in the Appendix at 21-25. The order and judgment entered by the District Court for the Southern District of Texas, Houston Division, dismissing Respondent's complaint

for failure to state a claim upon which relief could be granted, appear in the Appendix at 14-19. The order of that District Court denying Respondent permission to appeal under 28 U.S.C. § 1915 due to want of merit and good faith appears in the Appendix at 20.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 4, 1975. A timely petition for rehearing and suggested rehearing *en banc* was denied on October 2, 1975, Appendix at 26, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an inmate's *pro se* complaint which states that his injury has been diagnosed and treated by two licensed physicians raises a constitutional question or states a claim under 42 U.S.C. § 1983 upon which relief can be granted.

2. Whether the court of appeals erred in reversing the district court's summary dismissal of a complaint where both the judgment of the court of appeals and the complaint of the inmate rest upon a disagreement with licensed physicians as to diagnosis and treatment of the inmate's injury.

3. Whether a court of appeals has the power to decide a factual issue of paramount significance, which was neither presented to nor litigated in the district court, on the basis of hearsay evidence presented at the appellate level by means of an appendix to complainant's brief.

STATUTE INVOLVED

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Respondent, an inmate in the Texas Department of Corrections (T.D.C.), filed the *pro se* complaint contained in the Appendix hereto at 1-13 (A.1-13) under 42 U.S.C. § 1983 against Petitioners W. J. Estelle, Jr., Director of T.D.C., Ralph Gray, Medical Director of T.D.C. and chief medical officer of the prison hospital, and H. H. Husbands, Warden of the Walls Unit.

The United States District Court for the Southern District of Texas, Houston Division, summarily dismissed the complaint for failure to state a claim upon which relief could be granted. (A. 14-19).

Subsequently, the District Court denied Respondent's motion to vacate judgment and further denied him permission to appeal under 28 U.S.C. § 1915 due to want of merit and good faith. (A. 20).

The United States Court of Appeals for the Fifth Circuit granted Respondent's application for leave to appeal in forma pauperis and appointed Mr. Daniel K.

Hedges of Fulbright & Jaworski, Houston, Texas, to represent him on appeal. That Court had jurisdiction under 28 U.S.C. § 1291. After the submission of briefs and oral argument, the Court of Appeals reversed and remanded the cause with instructions to re-instate the complaint, appoint counsel and permit appropriate amendment. *Gamble v. Estelle*, 516 F.2d 937 (5th Cir. 1975); (A. 21-25).

Petitioners' timely application for rehearing and suggested rehearing *en banc* was denied on October 2, 1975. (A. 26).

Since the decisions of the courts below, and the decision of this Court with respect to the instant Petition, depend entirely upon the *facts* alleged by Respondent in his complaint, Petitioners find it necessary to set them out.

On *November 9, 1973*, Respondent, while unloading cotton bales from a truck and flipping them to a machine, sustained an injury to his lower back. A "6.00" (?) pound bale, which Respondent was flipping, started falling flat and fell on him while he was attempting to prevent it from falling. (A. 2).

Respondent worked four more hours, at which time he became stiff and requested a pass to the hospital. There, he was checked by a medical assistant (Captain Blunt) for a hernia and was sent to his living quarters. Two hours later, Respondent returned to the hospital, was given two pain pills by an inmate nurse, and saw a *doctor*. (A. 2).

The next day, *November 10, 1973*, Respondent was examined by *Dr. Astone* at the hospital who diagnosed his injury as a lower back sprain. *Dr. Astone* placed

Respondent on cellpass-cellfeed for two days, which meant he could remain in his cell, and prescribed Zactirin and Robaxin. (A. 3).

On *November 12, 1973*, Respondent again saw *Dr. Astone* at the hospital who continued the same medication and extended the cellpass-cellfeed. (A. 3).

On *November 19, 1973*, Respondent again saw *Dr. Astone* who prescribed Robaxin and Febridyne for seven days and extended the cellpass-cellfeed. (A. 3).

On *November 26, 1973*, Respondent again saw *Dr. Astone* who prescribed Zactirin for five days and extended the cellpass-cellfeed for seven days. (A. 3).

On *December 3, 1973*, Respondent again saw *Dr. Astone* who prescribed Febridyne for seven days but took him off the cellpass-cellfeed, which meant that he would do light work. The same day, Respondent went to Major Muddox's office and told him he was not going to work because of lower back pain, and Respondent was placed in administrative segregation. (A. 4).

On *December 5, 1973*, Respondent was taken before the unit disciplinary committee. He told the committee that he was still hurting, that he had only been given pain pills, and that *Dr. Astone* had not even noticed his high blood pressure. The committee took no action against Respondent and sent him to see another *doctor*. (A. 4).

The next day, *December 6, 1973*, Respondent saw *Dr. Gray*, the TDC Medical Director and chief medical officer of the prison hospital, at the hospital who administered urinalysis, blood analysis, and high blood pressure tests. *Dr. Gray's* diagnosis of his back injury was that he had incurred a lower back sprain. Respondent's blood pressure was found to be 168/112. *Dr. Gray* prescribed Serapes and Febridyne. (A. 4-5).

On *December 13, 1973*, Respondent saw *Dr. Gray* for back pain and high blood pressure. The blood pressure reading was found to be 152/98 and *Dr. Gray* prescribed Serapes for thirty days. (A. 5).

On *December 17, 1973*, Respondent saw medical assistant Blunt at the hospital for back pain and received a prescription of Tiognolos for seven days. (A. 5).

On *December 27, 1973*, Respondent again saw medical assistant Blunt who continued the Tiognolos prescription for seven days.

On *January 3, 1974*, Captain Linsley asked Respondent if he wanted to go to work. He replied that he was not going to work hurting, and Captain Linsley stated that he would send him to the farm. (A. 6).

On *January 5, 1974*, Lieutenant Ramsey asked the same question, received the same reply, and made the same statement. (A. 6).

On *January 7, 1974*, Respondent went to the hospital for lower back pain, high blood pressure, and migraine headaches. Medical assistant Blunt prescribed Sodium Solicylate for seven days and Serapes for thirty days. (A. 6).

On *January 17, 1974*, Respondent went to the hospital for lower back pain and stomach pain. Medical assistant Blunt prescribed Sodium Solicylate for seven days. (A. 7).

On *January 25, 1974*, Respondent went to the hospital for lower back pain. Medical assistant Blunt prescribed Sodium Solicylate for thirty days. (A. 7).

On *January 31, 1974*, Respondent was brought before the unit disciplinary committee pursuant to his refusal to go to work on *January 5*. He told the committee that he was not going to work with his lower back pain and high blood pressure. Medical assistant Blunt told the committee that Respondent's health classification was first class. The committee's ruling was adverse to Respondent, and he was placed in solitary confinement for refusing to work. (A. 7-8).

On *February 4, 1974*, Respondent complained of chest pain and black outs in the morning and was admitted to the hospital that evening. (A. 8).

On *February 5, 1974*, *Dr. Heaton* interpreted an electrocardiagram administered to Respondent as follows: multiple unifocal P.V.C., S (re-entry often), inverted T wave, A.V.R. - lead 3 (normal), elevated P wave. (A. 8).

On *February 6, 1974*, Respondent was transferred to administrative segregation and was placed on Quinidine pills by *Dr. Heaton* for three days. (A. 8). Respondent was still having chest pain when he was discharged from the hospital.

On *February 8, 1974*, Respondent asked Officer Spencer to go on sick call for lower back pain, chest pain and black outs when he stood up. Officer Spencer went to check and on his return told Respondent they did not want him to go on sick call. (A. 9).

On *February 9, 1974*, Respondent again complained of chest pain and saw *Dr. Heaton* at the hospital who continued the Quinidine prescription for another three days.

On *February 11, 1974*, Respondent signed the complaint, alleging the foregoing facts. (A. 13).

REASONS FOR GRANTING THE WRIT

I. The Decision Below, By Raising A Disagreement With Licensed Physicians As To Diagnosis And Treatment To A Constitutional Plane, Conflicts With The Decisions Of Eight Other Courts Of Appeals.

A. The Respondent's complaint and the decision below consist of a simple disagreement with licensed physicians as to diagnosis and treatment.

When the Respondent's *pro se* complaint is read with great liberality as to form, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and with special scrutiny as to the facts alleged, assuming them to be true, *Cooper v. Pate*, 378 U.S. 564 (1964), it is clear that Respondent's entire complaint rests on a difference of opinion with his physicians as to the diagnosis and treatment of his back injury. Of more alarming significance is that the opinion of the court below is premised upon a similar difference of opinion between the honorable judges and the physicians, resulting in federal constitutional intervention.

The Respondent himself stated that he saw Dr. Astone five times (A. 3-4), Dr. Gray two times (A. 4-5), and medical assistant Blunt six times (A. 2, 5, 6, 7). In addition, Respondent saw an unidentified doctor on the very day he was injured. (A. 2).

Contrary to the assertion of the court below that "the State . . . failed to diagnose Gamble's lower back injury," *Gamble v. Estelle*, 516 F.2d 937, 941 (5th Cir. 1975), both Dr. Astone and Dr. Gray, the T.D.C. Medical Director and chief medical officer of the prison hospital, diagnosed Respondent's back injury as a lower back sprain. (A. 3, 4).[1]

The doctors variously prescribed bed rest (cellpass-cellfeed), analgesics and/or muscle relaxants for the back sprain. Each of these plays a definite role in the *treatment* of lower back dysfunction, FINNESON, LOW BACK PAIN 95, 108, 111 (1973), contrary to the assertion of the court below that "the only medication prescribed was to relieve the pain, not to cure the injury." *Gamble v. Estelle, supra* at 941.

Further signifying the underlying difference of opinion between the judges and the doctors, the court below stated:

> "[T]he exact nature of the back injury remains unknown. Certainly the pain pills had no curative effect, even though they were administered for some 3 months."
> *Id.*

Contrary to the court's conclusion, the persistence of the pain was not an indication that the Respondent's injury was not a simple muscle sprain for "[t]here is no relationship *whatsoever* between the severity of the injury and the *intensity* or *duration* of the symptoms FINNESON, LOW BACK PAIN, *supra* at 90 (emphasis supplied). Moreover, the continuing pain could well

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[1]Dr. Gray did so after administering urinalysis and blood analysis tests, which are useful in eliminating the possibility that the back pain was caused by a systemic (organic) disease. KRAUS, CLINICAL TREATMENT OF BACK AND NECK PAIN 29 (1970).

have been caused by Respondent's refusal to discontinue his prolonged bedrest as ordered by Dr. Astone.[2] FRIEDMANN & GALTON, FREEDOM FROM BACKACHES 100 (1973); KRAUS, CLINICAL TREATMENT OF BACK AND NECK PAIN, *supra* at 24, 122.

The court below further suggested that x-rays and other tests should have been conducted "that would have led to *appropriate* diagnosis and treatment." *Gamble v. Estelle*, *supra* at 941 (emphasis supplied). First, a comprehensive examination of low back pain consists of a series of simple physical movements and should take no more than fifteen minutes. FINNESON, *supra* at 41-48. Second, Petitioners could discuss the relative attributes in terms of utility, risks etc. of various tests including x-rays, electromyograms, myelographies, discographies, and analysis of spinal protein fluid, but such a discussion would serve no useful purpose except to further emphasize the Respondent's and the court below's disagreement with the physicians' diagnosis of a lower back sprain.

---

[2]Note that Respondent's self-imposed bedrest causes "certain circulatory changes which may give rise to light-headedness and in some cases syncope once the erect position is resumed." FINNESON, *supra* at 96. Moreover, "[i]f the patient is under chronic stress, as most chronic . . . back patients are, the effect of the stress may help produce cardiovascular, gastro-intestinal, or other diseases." KRAUS, *supra* at 29. Indeed, Respondent's inversion of the T waves have generally been found in anxious patients, HURST & LOGUE, THE HEART 1471 (2d ed. 1970), though some normal persons have them. LITTMAN, TEXTBOOK OF ELECTROCARDIOGRAPHY 74 (1972). In addition (Respondent's) elevated P waves may be caused by hypertension. WHITE, HEART DISEASE 209 (1951).

B. Eight other courts of appeals have held that a disagreement with licensed physicians as to diagnosis and treatment does not raise a constitutional question or state a claim under 42 U.S.C. § 1983.

It is fundamental that the primary element necessary for recovery under 42 U.S.C. § 1983 is a deprivation of a right secured by the "Constitution and laws" of the United States. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). In the area of medical care afforded inmates, the requisite constitutional infirmity for federal jurisdiction has to be based on a transgression of either the eighth amendment's prohibition against cruel and unusual punishment or the fourteenth amendment's protection of life. Thus, eight courts of appeals have held that a complaint alleging a *refusal* to provide medical care states a claim under § 1983, but that a claimed *inadequacy* of treatment does not, absent *exceptional* circumstances.

In *Coppinger v. Townsend*, 398 F.2d 392, 394 (10th Cir. 1968), one court of appeals stated the distinction as follows:

> "A claim of total denial of medical care differs from a claim of inadequacy of medical care. . . .[I]n the instant case the allegations of the complaint show that medical care has been furnished. . . . The prisoner's right is to medical care-not to the type or scope of medical care which he personally desires. *A difference of opinion between a physician and a patient does not give rise to a constitutional right or sustain a claim under § 1983.*"(Emphasis supplied).

Three other courts of appeals have reasoned as follows:

> "[A]llegations of mere negligency in the treatment of a prisoner's condition or *claims based on*

a difference of opinion over matters of medical judgment fail to state a federal constitutional question. . . . [T]he *claimed inadequacy* of treatment must be predicated on *obvious neglect* or *intentional misconduct* by the prison officials (citations omitted), and must be so *heinous* as to constitute cruel and unusual punishment as that term is used in the Eighth Amendment or so endanger the prisoner's physical well-being that his Fourteenth Amendment right to life is violated." *Freeman v. Lockhart*, 503 F.2d 1016, 1017 (8th Cir. 1974) (emphasis supplied).

"[A] claim is not stated where (a prisoner) alleges no more than that he is dissatisfied as to the adequacy of treatment actually received for a particular injury or ailment. (Citations omitted). *Courts will not attempt to second-guess licensed physicians as to the propriety of a particular course of medical treatment for a given prisoner-patient." Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974). (emphasis supplied).

"Plaintiff is suffering from a back injury resulting from an automobile accident in 1958; the condition is painful but it is also chronic; he has not been denied access to medical help but has been permitted 'many times' to visit the prison hospital; he has not been denied treatment but has on occasion been given 'some type of pills for medication or some type of physical therapy, which does not help the plaintiff's back and neck.' Thus, plaintiff's allegations show only that he has not been receiving the kind and quality of medical treatment he believes is indicated." *Stiltner v. Rhay*, 371 F.2d 420, 421 n.3 (9th Cir.) cert.denied, 387 U.S. 922 (1967).

The decision of the court below conflicts with the decisions of yet four other courts of appeals. See *Fitzke v. Shappell*, 468 F.2d 1072, 1076 n.4 (6th Cir. 1972); *Corby v. Conby*, 457 F.2d 251 (2d Cir. 1972) and *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864 (2d Cir. 1970); *United States ex rel. Johnson v. Prasse*, 450 F.2d 946 (3d Cir. 1971) and *Gittlemacker v. Prasse*, 428 F.2d 1 (3d Cir. 1970); *Page v. Sharpe*, 487 F.2d 567 (1st Cir. 1973).

II. The Decision Below Designates The Federal District Courts As Medical Review Boards For Physicians In Correctional Institutions.

If a complaint which stipulates that the inmate has seen several different doctors on numerous occasions and that these doctors have diagnosed his injury and prescribed treatment does not warrant summary dismissal, no complaint will. If the district court could not dismiss under the *facts* alleged in the Respondent's complaint, every future treatment may be challenged.

The court below prescribed the appropriate medical course of action to be x-rays and other tests of Respondent. The basis for such a judicial medical prescription can be none other than a simple disagreement with the diagnoses of the doctors. Quite simply, this means that if an inmate were examined by a dozen different doctors, each of whom diagnosed an injury as a lower back sprain, a district court could not dismiss the case for failure to state a claim because the doctors believed x-rays and other further tests to be unnecessary for their diagnoses. In sum, instead of allowing experienced and trained physicians to decide which inmates genuinely need to be x-rayed and tested further, the court below has removed that medical judgment from the hands of the doctors and placed it in the courts.

Thus, if an inmate hereafter complains that the doctors have not cured his ailment, the federal district courts must intervene and review the physicians' diagnoses and treatment.[3] As a result, "the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous complaints." *Procunier v. Martinez*, 94 S.Ct. 1800, 1807 (1974).

III. The Court Below Usurped Power By Deciding An Issue Not Raised In The District Court By Means Of Hearsay Evidence Presented At The Appellate Level.

On the basis of the Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, a portion of which was reproduced in the Appendix to Respondent's brief below, the court below found that, "the general medical services afforded by the State [of Texas] in its prisons are publicly known to be 'woefully inadequate.'" *Gamble v. Estelle, supra* at 940 and n.1.

Though the issue of the adequacy of general medical services afforded by the T.D.C. is presently being actively litigated in numerous major lawsuits, *e.g. Ruiz v. Estelle*, Civil Action No. TY-5523 (E.D. Tex., filed Aug. 17, 1972), the court below decided this fact question in circumstances where it was not even presented to nor litigated in the district court. Moreover, the court did so on the basis of hearsay evidence presented *on appeal* in the Appendix to Respondent's brief, said hearsay

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[3]If this be a constitutional right, the courts should also recognize it for indigents outside of prison who cannot even afford to see two doctors on numerous occasions for a back injury.

consisting of a working paper which was not endorsed, adopted or issued by either the Joint Committee on Prison Reform or the Texas Legislature. (A. 27-28).

Additionally, it should be noted that the question of the adequacy of medical services in general is *totally irrelevant* to the issue of whether the treatment afforded *Respondent* abridged constitutional safeguards.

Petitioners submit that the court below exercised power not available to it under Article III of the United States Constitution by deciding an issue of paramount significance, which was neither before it nor the district court and whose determination was not necessary to the disposition of the case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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ATTORNEYS FOR
PETITIONERS

CERTIFICATE OF SERVICE

I, Joe B. Dibrell, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Petitioners. I do therefore certify that three copies of the foregoing Petition have been served by placing same in the United States Mail, First Class, Certified and Postage Prepaid, on this the 30th day of December, 1975, addressed to: Mr. Daniel K. Hedges, Attorney for Respondent, 800 Bank of the Southwest Building, Houston, Texas 77002.

JOE B. DIBRELL
Assistant Attorney General

Supreme Court, U. S.
FILED
DEC 31 1975
MICHAEL RODAK, JR., CLERK

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* * *

APPENDIX

To The Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Fifth Circuit

* * *

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UNITED STATE DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION.

HOUSTON, TEXAS.

J.W GAMBLE 235677A
WALLS UNIT P.O Box 32,
HUNTSVILLE, TEXAS, 77340
IN PROPRIA PERSONAM.

COMPLAINT

CIVIL ACTION NO.

(CIVIL RIGHT)

J.W. GAMBLE – PLAINTIFF

V.

W.J. ESTELLE JR. – DEFENDANTS, Director of the Texas Department of Corrections.
RALPH GRAY MEDICAL DIRECTOR. of the Texas Department of Correction.
H.H. Husbands. Warden of walls Unit.

CIVIL ACTION SUIT 42 USCA. SECTION 1983

TO THE HONORABLE JUDGE OF SAID COURT.

This is a civil action authorized By section 1983 to redress the Deprivation under Color of state laws of right secured By the constitution of the United State. The court has Jurisdiction under 28 U.S.C.A section 1343 Plaintiff seek Declaratory relief. pursuant to 28. U.S.C.A. section 2201 and 2202.

PLAINTIFF J.W. Hamble is and was at all time Mentioned herein a prisoner of the state of Texas in custody of the Texas Department of Correction He is Curlently confined in walls. Unit Huntsville Texas.

DEFENDANT W.J. Estelle Jr. is the Director of the Texas Department of Corection of the state of Tex he is legally responsible for the overall, operation of the Department and each institution under Jurisdiction including the Walls unit at Huntsville Texas, His address is Box 32 Huntsville Texas 77340

DEFENDANT. DR. Ralph Gray is the medical Director of the Texas Department of correction. He is legally responsible for the overall operation of the Centine Medical Department of the state Department of correction. His address is Box 32 Huntsville Texas 77340

DEFENDANT H. H Husbands is the worden of the Walls Unit, Huntsville Texas, He is legally responsible for the operation of the walls Unit and for the welfare of all the inmate of that Prison His address is Box 32 Huntsville Texas 77340

FACTS

on or about 9th Day of November 1973 about 930 Am plaintiff was working for the Texas Department of correction, plaintiff Job assignment was at the Textile mill Huntsville Texas working as a cotton picker machine operator, plaintiff was unloading cotton from a truck, the Bale of cotton weigh about 6.00 pounds each. plaintiff was flipping the cotton to the machine but the Bale of cotton fell flat plaintiff tried to keep the Bale of cotton from following flat the cotton fell on plaintiff, plaintiff lifted the Bale of cotton off himself and injury plaintiff lower Back.

plaintiff work for about four more hour. operation the picker machine But didnot handle anny more Bale of cotton after four hour. - plaintiff got very stiff, then plaintiff asked a officer at the textile mill for a pass to the Unit hospital plaintiff went to the unit hospital and was checked By a medical assistance a captain Blunt captian Blunt check plaintiff for a Hernia But plaintiff didnot see a Doctor for his hurting captian Blunt didnot give plaintiff anny thing for plaintiff pain. Captain Blunt send plaintiff to the West Building 16B4 were plaintiff was living. plaintiff was hurting so Bad, plaintiff return to unit hospital to hour. later plaintiff seen a inmate nurse gave plaintiff two pain pill, finally plaintiff seen a Doctor.

on or about 10th Day of November 1973 at the unit hospital Doctor Name was Dr. astone, examind plaintiff and place plaintiff on cellpass and called, cellpass called is when plaintiff remain in his cell at all time. plaintiff was then move from west Building 1604 to Fird Building 31821 Doctor astone place plaintiff on Zoctirin π Tid x 60 and Robaxin π Tid x 7d. Dr. astone medical Record show that plaintiff Receive a lower Back strain plaintiff remain on cellpass called for two days Enclose is exhibit Ⓒ

on or about 12th Day of November 1973, plaintiff Return to unit hospital and seen a Doctor astone he place plaintiff on cellpass called for another 7th days. plaintiff staid on some medicaleation as above plaintiff remain in cell except for shower [redacted] Doctal astone place plaintiff on lower Bunk for one week. But the Building Department didnot issue plaintiff lower Bunk. plaintiff remain at Fird Building 31821 on top Bunk, enclose is exhibit Ⓐ for Lower Back strain.

on or about 19th Day November 1973, plaintiff return to unit hospital and seen a Doctor astone he place plaintiff on Robaxin π Tid x 7d. and febridyne π Tid x 7d. for 7th days he place plaintiff on cellpass for 7th days, cellpass is when your remain in your cell at all time except for eating and shower. plaintiff move from Fird Building 31821 to West Building 1489 Enclose is exhibit Ⓑ.

on or about 26th Day of November 1973 plaintiff Return to unit hospital for lower Back strain and seen a Doctor astone he place plaintiff on Zoctirin π Tid x 6d. for five days also place plaintiff on 7th days Cellpass. cellpass is when you go to eat and to shower. Enclosed is exhibit Ⓓ

Doctor Gray gave plaintiff a test for high Blood - - - pressure, the first reading was 168 over 112 the Doctor place plaintiff on high blood pressure pill name seraples for 7th days and place plaintiff on a pain pill name febridyne Tid 78 for 7th days plaintiff remain in administrative segregation 32-A-7 fine Building.

on or about 13th Day of December 1973, plaintiff return to unit hospital for lower Back hurting and high Blood pressure reading plaintiff seen a Doctor gray after plaintiff was on high blood pressure pill name seraples for 7th days the reading was 152 over 98 Doctor gray place plaintiff on seraples pill for 30th days But some how the unit staff lost plaintiff prescription and didnot find the prescription until plaintiff return to the unit hospital on the 17th Day of December 1973 But Doctor gray written the prescription on the 13th Day of December 1973 plaintiff remains in administrative segregation 32-A-7 fine Building.

on or about 17th day of December 1973, plaintiff return to unit hospital, plaintiff didnot a Doctor gray or anny other Doctor plaintiff seen a Captain Blunt medical assistance he place plaintiff on a pain pill name Diagnales for 7th days this pill is a muscle relaxer pill make the bottom of plaintiff stomach hurt plaintiff went to hospital for lower Back hurting, plaintiff remains in administrative - - - - segregation fine Building 32-A-7-,

on or about 27th day of December 1973, plaintiff return to unit hospital for lower Back hurting and didnot see Doctor Gray or anny other Doctor plaintiff seen a Captain Blunt medical assistance he gave plaintiff the Diagnales pill for 7th Days, plaintiff remains in administration segregation 32-A-7, fine Building.

on or about 3th Day of December 1973, plaintiff return to unit hospital for lower Back strain. and seen a Doctor ostone he taken plaintiff off callpass But left plaintiff on medicalcation a pill name febridyne Tid x 30. for 7th days, when your are taken off callpass this mean that you will do light works plaintiff told Doctor ostone that his lower Back was still hurting just as bad as the first day plaintiff was injured.

on or about 3th December 1973, plaintiff went to major muddot office, plaintiff talk major muddot that plaintiff was still hurting from his lower Back strain and that plaintiff was not going to work hurting major muddot had plaintiff move from west Building 148 to fine Building, 32-A-7 is in administrative segregation where plaintiff is now living.

on or about 5th Day of December 1973, plaintiff was taken in front of the unit disciplinary committee plaintiff told the committee that plaintiff was still hurting from lower Back strain and that the only thing that Doctor ostone had dis for his Back injury. was to give plaintiff pain pill, plaintiff explain to the committee, that plaintiff was under Doctor ostone care for 26th days and that Doctor didnot even notice that he suffer from high Blood pressure. The unit disciplinary committee didnot take any action against plaintiff, But send plaintiff to see another Doctor plaintiff remain in administrative segregation at 32-A-7 fine Building.

on or about 6th Day of December 1973 plaintiff went to the unit hospital and seen a Doctor Gray. Doctor Gray gave plaintiff a urinalysis test and a Blood analysis. that check off Doctor gray Medical Record show that plaintiff received a lower Back strain

on or about 3th Day of January 1974 [redacted] Captain Linsley came By plaintiff cell 32-A-7 fire Building and asked plaintiff if plaintiff wanted to go to work plaintiff answered was that plaintiff was not going to work hurting Captain Linsey said I will send you to the Farm. Plaintiff remains in administrative segregation 32-A-7 fire Building

on or about 5th Day of January 1974 lieutenant Ramsey came By plaintiff cell 32A-7 fire Building and asked plaintiff if Captain Linsey had talk to plaintiff. plaintiff said yes then lieutenant Ramsey asked plaintiff if plaintiff wanted to go to work. plaintiff told him that plaintiff was not going to work hurting lieutenant Ramsey said I will send you to the Farm. plaintiff remains in administrative segregation 32A-7 fire Building

on or about 7th Day of January 1974, plaintiff asked to go on sick call about 8:00 in the morning But at 12 noon officer [redacted] return and told plaintiff that he couldnot make sick call, plaintiff was going on sick call for his lower Back hurting and for migraine headaches.

on or about 7th Day of January 1974 plaintiff finely made it to the Unit hospital about 3 Pm that Same plaintiff went to hospital for lower Back hurting and migraine headaches and for high Blood pressure plaintiff didnot see Doctor Gray or anny other Doctor plaintiff saw a Captain Blunt he gave plaintiff a pill name sodium salicylate, T x 7 d. for 7th days and scropes Td. for 30th days Captain Blunt is a medical assistance plaintiff remains in administrative segregation 32A-7 fire Building

on or about 17th Day of January 1974 plaintiff went to unit hospital for lower Back hurting and stomach pain plaintiff didnot see Doctor Gray or anny other Doctor plaintiff saw a Captain Blunt medical assistance he gave plaintiff a pill name sodium salicylate T x 7 for 7th days plaintiff remains in administrative segregation 32A-7 fire Building.

on or about 23rd Day of January 1974 plaintiff went to the unit hospital for lower Back hurting plaintiff didnot see a Doctor Gray or anny other Doctor plaintiff saw a Captain Blunt medical assistance he gave plaintiff a pill name sodium salicylate T x 7 for 30th Days for lower Back hurting plaintiff remains in administrative segregation 32 A-7. fire Building.

on or about 31th Day of January 1974, plaintiff was Brought in front of the unit disciplinary committee for charges on the above date of [redacted] January 5th day. 1974 plaintiff told the committee that plaintiff was not going to work hurting... in Captain Linsey Report didnot state that... plaintiff had talk to him. Captain Report left out that plaintiff was hurting.

plaintiff told the committee that plaintiff lower Back was still hurting. plaintiff also explain to the committee that he suffer from high Blood pressure But the committee find... plaintiff guilt and put plaintiff into solitary confinement. no. Doctor or doctor aid or medical personnel checked Before putting plaintiff into Solitary confinement plaintiff was move from 32-A-7 to 3102 fire Building plaintiff case C72-116-20-HN is still on appeal. and have not made it to the Court of Criminal appeal in austin texas yet.

She unit disciplinary committee call. caption Blunt. medical assistance. he told the [redacted] committee that plaintiff medical class was still first class this was on the 31th day of January 974. plaintiff have Receive a Back injury and suffer from high Blood pressure and Heart trouble, But plaintiff is still in first class. plaintiff when he first was place in the Texas Department of correction Diognostic center the first thing plaintiff did was to tell the Doctor that plaintiff suffer from high Blood pressure. plaintiff remains in ---- solitary confinement.

~~on or about 4th day of February 1974~~, D... asked officer Ratini could plaintiff see a Doct: about 8 am. that morning plaintiff was having chest pain. and plaintiff was having Blank out. the ~~sargent~~ on duty said that he would have to check with the ~~warden~~ office. Becaus all inmate in solitary confinement would have to go thought the warden Before he could see a Doctor about 2 Pm. that evening ~~sargent~~ chance come on. he call the unit hospital. finely about 730 pm that night a medical personnel checked plaintiff and place plaintiff in the unit hospital for chest pain and high Blood pressure.

on or about 5th day February 1974, plaintiff saw a Doctor HEATON interpretation of [redacted] E.K.G. as follows: multipul. unifocal P.V.C.'s (Re-entry often), inverted "T" wave, A.V.R. - lead 3 (normal); elevated "P" wave. on the 6th day February 1974 plaintiff was move from hospital to 32A 20. five Building plaintiff remains in administrative segregation. Doctor Heaton place plaintiff on a pill name quinidine Tid x 3 for 3th days.

~~on or about 7th day of February 1974~~, plaintiff asked officer ~~spencer~~ and officer ~~Ratini~~ -- could plaintiff go on sick call for my [redacted] lower Back was hurting and plaintiff was having chest pain and plaintiff left arm hold the same pain as plaintiff chest did this was about 8 am in the morning plaintiff is in administrative segregation 32 A 20 five Building. and connat see a Doctor unless a officer take you, and they didnat take plaintiff on this days,

Plaintiff was discharge from the unit hospital on the 6th day of February 1974 But plaintiff was still having chest pain when plaintiff was discharge,

~~on or about 8th day of February 1974~~ plaintiff asked officer ~~spencer~~ and officer ~~Ratini~~ could plaintiff go on sick call. about 8 am in the morning about 12 noon officer ~~spencer~~ return and said they didnat want plaintiff to go on sick call he gave plaintiff no Reason why plaintiff could not go on sick call plaintiff was going on sick call for chest pain and lower back hurting plaintiff is also having Blank out when plaintiff stand up plaintiff is in administrative segregation 32 A 20 five Building and connat see a Doctor unless an officer take you and they didnat take plaintiff on this days.

~~on or about 9th day of February 1974~~ plaintiff asked officer spencer again could plaintiff go on sick call for chest pain, finally they let plaintiff go on [redacted] to the unit hospital, Doctor Heaton place plaintiff [redacted] on a short pill name quinidine Tid x 3 for 3th days plaintiff remains in administrative segregation 32 A 20. five Building

LEGAL CLAIMS

Plaintiff has receive a physical Back injury
Defendant Responsible W.J. Estelle Jr.
Director of the Texas Department of Correction
Bat 32. Huntsville Texas, he is Responsible for
all industrial mechinsary and work in the
Textile mill where plaintiff receive Back injury.

plaintiff, has'nt done anmything wrong to
plaintiff, Knowlage plaintiff is Being Discrimination
against and Privileges Taken away That is guarantee
guaranteed by fourteenth amendment,
Defendant Responsible H.H. Husbonds warden of
the wall unit Bat 32 Huntsville Texas, he is also
Responsible for sufficient man powder to
conduct work safely in the Textile mill area.
and due to innsufficient man. power plaintiff
sustain Back injury. also defendant failure to
provide medical care needed By plaintiff.
J.W. Hamble, Constituted, cruel and unusual pun-
ishment and punishment without due process
of law, that is guaranteed By fourteenth amendment.
also the Eight amendment United state constitution
plaintiff has. receive inadequate medical
treatment for plaintiff injury.
Defendant Responsible. Dr. Ralph Hoag medical
Director of the Texas Department of Correction
Bat 32 Huntsville, Texas, he is also Responsille
for medical facilities at the walls unit
where plaintiff is presently Being treated for
Back injury that plaintiff sustain in the Textile
mill at the walls unit Huntsville Texas plaintiff
also Being treated for high Blood pressure
and Heart truble,

plaintiff in this action does not complain about
the validity of his confinement but instead.
plaintiff complain about the wrong committed
By the three defendant about. which caused.
the plaintiff to suffer mental anguish.

Defendant W.J. Est. Jr. failure to provide medica
care needed By plaintiff J.W. Hamble constituted
cruel and unusual punishment and punishment
without due process of law of the fourteenth amend-
ment, also the eight amendment U.S. constitution
Defendant Dr. Ralph Hoag failure to provide medical
care needed By plaintiff J.W. Hamble constituted
cruel and unusual punishment and punishment
without due process of law of the fourteenth
amendment also eight amendment U.S. constitution
So the Honorable judge of said court if plaintiff
Don't oncerned show cause order in the time
Required it will Be that defendant W.J Estelle Jr
or member of his staff would force plaintiff
in Solitary Confinement with the door closed and
they will shut let plaintiff used the will known
let plaintiff mail show cause order out.

Wherefore plaintiff respectfully prays that this
court enter judgment granting plaintiff.
① Declaratory judgment that the defendant acts
policies and practices described herein violate
plaintiff right under the United State Constitution

② a preliminary and permanent injunction
which
Ⓐ prohibits the defendants their successors in
offic agents and employees and all other persons
in actied concert and participation with them
from harassing threatening punishing or---
retaliating in any way against plaintiff because
he filed this action.

Ⓑ prohibits defendant W.J. Estelle Jr and H.H. Husbands
from transferring plaintiff to any other institution
without that plaintiff express consent during
the pendency of this action

© Require defendant W.J. Estelle Jr. member to remove from plaintiff prison files any write up or other report concering this events discribed herein and references to plaintiff possession of revolutionary literatures and- prohibits H.H Husbonds from permitting any reports to be placed in plaintiff files at any future time.

③ Trial By Jury all issues triable By Jury.

④ plaintiff cost of this suit

⑤ Compensatory Damages in the amount of. 100,000. Dollars to plaintiff from each defendant W.J. Estelle Jr. and Doctor Ralph Gray and H.H. Husbonds.

⑥ Punitive Damages in the amount of. 25,000. Dollars to plaintiff from each defendant W.J. Estelle Jr. and Doctor Ralph Gray and H.H. Husbonds.

⑦ Such other and further relief as this court may deem just. proper and equitable

⑧ plaintiff moves this court for an order permitting them to file this action in forma--- pauperis without prepayment of fee and costs or security therefor and appointing Tom M. Shaw. 1412 Main Street Dallas Texas 75202 a member of the Texas Bar to represent plaintiff as provided in 28 U.S.C. section 1915 and 18. U.S.C section 3006A (g) Because as their---- attached affidavits indicate plaintiff are unable to pay such costs or find security therefor and cannot afford to employ an attorney. this motion is Base on the complaint affidavits and memorandum of law. Submitted herewith.

Respectfully Submitted

J. W. Humble

J. W. Humble 235677-A
Walls Unit P.O. Box 32
Huntsville Texas 77340
In forma pauperis papers

Subscribed and sworn to
Before me this ___ of ___ 19__

Notary Public in and for
Walker County Texas

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 10 1974
V. BAILEY THOMAS, CLERK
BY DEPUTY:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. W. GAMBLE, §
§
Plaintiff, §
§
vs. § C.A. NO. 74-H-777
§
W. J. ESTELLE, JR., §
Director, Texas Department §
of Corrections; §
RALPH GRAY, Medical §
Director, Texas Department §
of Corrections; and §
H. H. HUSBANDS, Warden, §
Walls Unit, Texas §
Department of Corrections, §
§
Defendants. §

FINAL JUDGMENT

For reasons set forth in the United States Magistrate's Memorandum and Recommendation, signed on June 6, 1974, it is ORDERED that said Recommendation be and the same is hereby adopted as the Court's Memorandum and Order.

1. Leave to proceed in forma pauperis, in this Court only, is granted;

2. The Clerk is required to file this petition;

3. Plaintiff's request for appointment of counsel is denied;

4. This cause of action is hereby dismissed for failure of plaintiff to state a claim upon which he would be entitled to federal relief under the Civil Rights Act.

DONE at Houston, Texas, on this 10th day of June 1974.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 10 1974
V. BAILEY THOMAS, CLERK
BY DEPUTY

J. W. GAMBLE,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	C.A. NO. 74-H-777
	§	
W. J. ESTELLE, JR., Director, Texas Department of Corrections; RALPH GRAY, Medical Director, Texas Department of Corrections; and H. H. HUSBANDS, Warden, Walls Unit, Texas Department of Corrections,	§	
	§	
Defendants.	§	

June 6, 1974

MEMORANDUM AND RECOMMENDATION:

Plaintiff, an inmate in the Texas Department of Corrections,brings suit for declaratory and injunctive relief as well as for damages under the Civil Rights Act complaining that the named defendants have denied him adequate medical attention for a back injury incurred during a work assignment. Plaintiff further requests a jury trial, appointment of counsel, and permission to proceed in forma pauperis.

With respect thereto, it is RECOMMENDED as follows:

1. Permission to file in forma pauperis, in this Court only, be granted;

2. The Clerk be required to file this petition;

3. Plaintiff's request for appointment of counsel be denied;

4. This cause of action be dismissed for the failure of plaintiff to state a claim that would entitle him to relief under the Civil Rights Act.

It is clear that prison inmates are entitled to adequate medical care and [illegible]atment. State officials of necessity are vested with broad discretion in determining the nature and character of medical treatment to be afforded prison inmates and the federal courts are reluctant to interfere unless there is shown exceptional circumstances demonstrating an abuse of that discretion. Lawrence v. Wainwright, 440 F.2d 379 (5th Cir. 1971).

It is within the context of these well established general principles that the undersigned reviewed and considered the plaintiff's bare assertions of medical deprivation.

Apparently in November 1973, the inmate incurred a low back injury when a heavy bale of cotton fell on him while he was working in the textile mill at the Department of Corrections. The plaintiff then details a program of medical treatment, examinations by prison doctors, hospitalization and medical lay-ins he received on approximately 24 separate occasions between the date of the injury and extending into early this year.

The undersigned, by letter dated February 15, 1974, requested the plaintiff to clarify and particularize his allegations of deprivation in view of the program of treatment outlined in his pleadings. His response did not do so.

The plaintiff's allegations were again reviewed and are, in the judgment of the undersigned, insufficient to cause a federal court to interfere with the broad discretion permitted the prison officials in affording medical treatment to inmates in their trust.

For the foregoing reasons, it is RECOMMENDED that this cause of action be dismissed.

DONE at Houston, Texas, on this 6TH day of June 1974.

Howard Bland
UNITED STATES MAGISTRATE

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
AUG 12 1974
V. BAILEY THOMAS, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

J. W. GAMBLE,)
)
Plaintiff,)
) CIVIL ACTION
V.)
) NO. 74-H-777
W. J. ESTELLE, Director,)
Texas Department of Corrections,)
ET AL,)
)
Defendants.)

RECEIVED
AUG 14 ..

J. W. Gamble, pro se.

John L. Hill, Attorney General of [illegible]
Texas, Larry F. York, Assistant [illegible]
Attorney General of Texas, Austin,
Texas, for defendants.

O R D E R

Before this Court for consideration is Plaintiff's Motion to Vacate Judgment. After due consideration, the motion is denied.

Plaintiff is hereby denied permission to prosecute his appeal in this case under Section 1915, Title 28, United States Code, since this Court believes that said appeal is lacking in merit and, as a result, is not taken in good faith.

DONE at Houston, Texas, this 12th day of August, 1974.

Carl O. Bue, Jr.
United States District Judge

nership in order to avoid any mechanics' liens against partnership property. These actions are irrelevant to the question of G.T.O.'s payroll taxes. In fact, Cooper himself had disbursed gross payroll checks from the partnership to G.T.O., so it is clear that G.T.O. always had an available source of revenue specifically intended for the withholding fund. We are satisfied that Cooper never had the kind of control over G.T.O. financial affairs which would require or even allow him to control the disposition of these funds. We therefore affirm the decision of the district court on the ground that Cooper was not a "person" within the meaning of that term as used in 28 U.S.C. §§ 6671(b) and 6672.

Having decided that Cooper was not within the intended reach of the term "person" under the penalty statute, we need not consider the question of the willfulness of his actions.

The judgment of the district court is affirmed.

KEY NUMBER SYSTEM

J. W. GAMBLE, Plaintiff-Appellant,

v.

W. J. ESTELLE, Director, Texas Department of Corrections, Defendant-Appellee.

No. 74-3727.

United States Court of Appeals, Fifth Circuit.

Aug. 4, 1975.

A state prisoner's pro se complaint was accepted for filing by the United States District Court for the Southern District of Texas at Houston, Carl O. Bue, Jr., J., but the cause was dismissed, without appointment of counsel, for failure to state a claim. The prisoner appealed. The Court of Appeals held that the complaint, alleging in effect that prisoner had sustained injury to his lower back while performing required work and that there had been a total failure to provide adequate diagnosis or treatment and that the prisoner had high blood pressure, "blank outs" and heart disease and was experiencing daily pain and suffering was sufficient to state an actionable claim under the 1871 civil rights statute for inadequate medical care.

Reversed and remanded with instructions to reinstate complaint, appoint counsel and permit appropriate amendment.

1. Federal Civil Procedure ⇐656

District courts must be sensitive to problems of pro se plaintiff in civil rights actions and not be too quick to dismiss for failure to state technical cause of action, and there should be even greater liberality on part of district court where State has not been required to file any pleading whatever. 42 U.S.C.A. § 1983; 28 U.S.C.A. §§ 2201, 2202.

2. Civil Rights ⇐13.4(5)

Court in civil rights actions by prisoners must exercise highest degree of care to make certain that prisoner is not deprived of his federally secured constitutional right to medical care. 42 U.S.C.A. § 1983; 28 U.S.C.A. §§ 2201, 2202.

3. Civil Rights ⇐13.12(6)

State prisoner's pro se complaint alleging in effect that he had sustained injury to lower back while performing required work and that there had been total failure to provide adequate diagnosis or treatment and that prisoner had high blood pressure, "blank outs" and heart disease and was experiencing daily pain and suffering was sufficient to state actionable claim under 1871 civil rights statute for inadequate medical care. 42 U.S.C.A. § 1983; 28 U.S.C.A. §§ 2201, 2202.

Daniel K. Hedges, Houston, Tex. (Court appointed), for plaintiff-appellant.

John L. Hill, Atty. Gen., Bert W. Pluymen, Asst. Atty. Gen., Austin, Tex., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Associate Justice,* and GOLDBERG and AINSWORTH, Circuit Judges.

PER CURIAM:

Appellant J. W. Gamble is presently incarcerated in the Walls Unit of the Texas Department of Corrections. On May 30, 1974, he requested leave to file this civil rights action against three officials of the Texas Department of Corrections, appellees, under 42 U.S.C. § 1983, 28 U.S.C.A. §§ 2201 and 2202, alleging in a 24-page handwritten complaint "failure to provide medical care needed", in that "the only thing that [appellees] had did for his back injury [suffered while imprisoned] was to give [him] pain pills."

Gamble, it appears, was injured on November 9, 1973, when a 600-pound bale of cotton fell upon him during a prison work assignment at the prison textile mill in Huntsville, Texas. A United States Magistrate, without requesting a reply from the State officials, recommended, and the United States District Judge ordered, the following: (1) that permission to file the case be granted; (2) that the petition be filed; (3) that the request for appointment of counsel be denied; and (4) that the cause of action for injunction and damages be dismissed for failure to state a claim under the Act. After a motion to vacate this order and a request to prosecute this appeal was denied, this court granted Gamble's application for leave to appeal *in forma pauperis* and for the appointment of counsel.

The state officials contend that Gamble was not refused medical treatment, that the doctors applied the proper diagnostic techniques, and that the complaint did not allege any exceptional circumstances warranting judicial inquiry. We find the complaint sufficient in alleging that the action of the authorities was tantamount to a refusal of medical treatment and remand the case for further action in the light of this opinion.

I.

At the outset, we note that the State admits that Gamble, a prison inmate, was working in the textile mill by assignment of the appropriate official when he was injured. Gamble alleges that his injury was "due to insufficient manpower" at the installation and was aggravated by "failure to provide medical care needed . . ." It appears that appellant was unloading a truck when the injury occurred and that he continued to work for some four hours thereafter operating the "picker machine". Later he became stiff and requested a pass to the unit hospital, which was granted. At the hospital he was given a checkup for hernia by a medical assistant and was sent back to his cell. Two hours later, his pain had become so intense that he returned to the hospital and was initially seen by a nurse who gave him two pain pills, and later by a doctor who examined him but gave him no treatment. On November 10th, he was examined by a doctor who diagnosed the injury as lower back strain and prescribed Zactrin and Robaxin for the pain. The doctor placed him on a cell-pass cell-feed routine, in which the inmate remains in his cell at all times, save to make his toilet, and Gamble was moved from his original cell to Building No. 5. On November 12th and 19th, Gamble—at his request—again saw the same doctor, complaining of continued pain, but in each instance the only prescription given was pain pills and the cell-pass cell-feed routine. On November 26th, Gamble again returned to the hospital with the same symptoms, and the same doctor gave the same prescription, except that in addition he directed that Gamble's bunk be changed from the top to the lower tier for one week. This direction, it appears, was never effected.

* Of the Supreme Court of the United States (Retired) sitting by designation.

On December 3rd, Gamble was seen by the same doctor who took him off the cell-pass cell-feed routine and concluded that he was able to engage in light work, despite Gamble's statement that his back was still hurting just as bad as the first day it was injured. More pain pills were prescribed. Later during the same day, Gamble advised the prison administrative office that he was still hurting from his back injury and could not perform work. He was then placed in "administrative segregation" (i.e., solitary confinement) in Building No. 5, and on December 5 was taken before a prison disciplinary committee. He advised the committee, as he stated in his *pro se* petition, that he "was still hurting from lower back strain and that the only thing the doctor had did for his back injury was to give plaintiff pain pills." He further advised them that, although he had been under the doctor's care for some 26 days, the doctor had never noticed that he was suffering from high blood pressure; whereupon the Committee directed that he be examined by another doctor.

Gamble remained in "administrative segregation" throughout the months of December and January. On December 6th, he was examined by another doctor, who found his blood pressure to be 168 over 112, and he was given high blood pressure pills and pain pills for seven days. On December 13th, appellant again saw the second physician who renewed the same prescriptions for a 30-day period. On December 17th, appellant complained again of back pain and was given a prescription by a medical assistant. The same prescription was renewed for another week on December 27th.

On January 3, 1974, a prison officer asked Gamble if he wanted to go to work, to which appellant replied that "he was not going to go to work hurting". The officer stated that he would send appellant to the prison work farm. On January 5th, another officer threatened him with a transfer to the farm again. On January 7th, about 8:00 a.m., Gamble asked to be allowed to go on sick call for his back pain and migraine headaches, but it was not until 3 p.m. that his request was granted, and he was not allowed to see a doctor. A medical assistant gave him a week's supply of mild pain killers and a 30-day supply of high blood pressure pills. The issuance of pain pills was repeated on January 17th and January 25th.

On January 31st, Gamble was again brought before the disciplinary committee on the January 5th charge of refusing to work. The medical assistant told the committee that appellant's health was "first class", despite appellant's statement to the committee that his "lower back was still hurting" and that he suffered from high blood pressure. No physical examination whatever was given appellant for this hearing. The committee found him guilty and placed him in solitary confinement. Five days later—while still in solitary—at about 8 a.m. Gamble asked a guard if he could see a doctor because he was experiencing "chest pain" and, in appellant's words, "blank-outs". According to appellant, the sergeant on duty reported that, for inmates in solitary, such a request would have to be approved by the warden's office. Finally, about 7:30 p.m., a medical assistant checked Gamble and put him in the hospital for "chest pain and high blood pressure." The next day he was examined by a doctor, and Gamble's electrocardiogram was interpreted as follows: multiple unifocal P.V.C., S(re-entry often), inverted T wave, A.V.R.-lead 3 (normal), elevated P wave. On the following day, February 8, 1974, he was placed on quinidine, a heart relaxant, for three days. He was discharged from the hospital, although he still had chest pain which extended into his left arm, and returned to solitary.

On February 8, 1974, appellant asked a guard if he could go on sick call, complaining of lower back pain, chest pain, and blackouts when he stood up. The

guard went to check and, on his return, told appellant the prison officials did not want him to go on sick call. The next day appellant again complained of chest pain and saw the doctor who had previously given him the EKG at the unit hospital and who continued the quinidine prescription for another three days. On February 11, 1974, appellant signed the complaint, the dismissal of which is the basis of this appeal.

II.

Federal courts have traditionally been reluctant to interfere with the administration of prison systems, especially those of the States; nevertheless, we note that there has been a steady increase of cases in the federal courts involving attacks on the medical, as well as the disciplinary, procedures followed in prisons. While the bench has time and again suggested that administrative procedures be established to handle complaints such as the one Gamble presents here, the response from the States has been minimal. As a result, we are obliged to hear and decide such cases under somewhat broad constitutional principles.

In considering *pro se* applications under Section 1983, we invariably find that prisoners—who are illiterate and unable to express themselves in the clear and unequivocal language required in legal pleadings—have been required to write out the complaints themselves, largely in long hand and with no knowledge whatever of the legal procedures involved. Consequently, we read such complaints with liberality and to the facts alleged, take the facts as true in cases such as the one here, and examine the record with special care and scrutiny. Though we are pleased to see from the State's brief before this court that it agrees with these standards, we again express regret that it has not yet established the sort of administrative procedures in its criminal justice system which would have obviated the filing of cases such as this one.

On the merits, the State says that the complaint here alleges neither a deprivation of medical care nor inadequate medical treatment under such exceptional circumstances as to permit federal intervention. *See Stiltner* v. *Rhay*, 371 F.2d 420 (9th Cir. 1967); *Freeman* v. *Lockhart*, 503 F.2d 1016 (8th Cir. 1974); *Corby* v. *Conboy*, 457 F.2d 251 (2d Cir. 1972); *Thomas* v. *Pate*, 493 F.2d 151 (7th Cir. 1974); and *Fitske* v. *Shappell*, 468 F.2d 1072 (6th Cir. 1972). The Magistrate based his recommendation to dismiss on the proposition that the complaint must allege an "abuse of discretion by state prison authorities in providing medical treatment for prisoners." *Lawrence* v. *Wainwright*, 440 F.2d 379, 380 (5th Cir. 1971). We do not find any of these cases controlling here, for we think that appellant's complaint should be read to state a cause of action.

[1, 2] District courts must be sensitive to the problems of the *pro se* plaintiff in civil rights actions and not be too quick to dismiss for failure to state a technical cause of action. *See*, e. g., *Haines* v. *Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *Wilbron* v. *Hutto*, 509 F.2d 621, 622 (8th Cir. 1975). While this complaint is not framed in terms of the cases cited by appellees, in part because Gamble is "unschooled" in the law, *see Granville* v. *Hunt*, 411 F.2d 9, 10 (5th Cir. 1969), such a situation calls for even greater liberality on the part of the district court, in our view, where the State has not been required to file any pleading whatever. Moreover where the general medical services afforded by the State in its prisons are publicly known to be "woefully inadequate" [1], the court must exercise

1. *See* Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, filed on November 25, 1974, in Appellant's Brief, App.A, at A2–A26. The Committee found: "Even a cursory review of the Texas Department of Correction's medical program discloses extremely serious inadequacies. There is a serious shortage of trained and competent medical personnel—doctors, nurses, and technicians. At various times during our study of TDC, there were from one to three full-time doctors on the staff; their services are supplemented by use of a number of part-time physicians from the Huntsville area and localities near other units. But this is still not enough. [The TDC Medical Director] has administrative and supervisory responsibility for all medical care for the entire system of 17,000 inmates • • •. [T]he two other full-time doctors have resigned, leaving the already overworked [Director] to bear sole full-time responsibility for 17,000 inmates. • • •. [T]he demands are many times in excess of one man's capabilities." *Id.* at A5–A6.

the highest degree of care to make certain that a prisoner is not deprived of his federally secured constitutional right to medical care.

[3] As we read the pleading here, the State not only failed to diagnose Gamble's lower back injury which he suffered while in the performance of work required by it, but the State has totally failed to provide adequate treatment of that condition. Again and again, as the complaint makes clear, the only medication prescribed was to relieve the pain, not to cure the injury; indeed, the exact nature of the back injury remains unknown. Certainly the pain pills had no curative effect, even though they were administered for some 3 months. Moreover, Gamble still has his high blood pressure, "blank outs", and heart disease. And what makes this all the more disconcerting is the fact that he has spent months in solitary confinement without medical care and stands a good chance of remaining that way without intervention.

We can only conclude that Gamble has stated an actionable claim under Section 1983 for inadequate medical care. *See Williams* v. *Vincent*, 508 F.2d 541 (2d Cir. 1974); *Tolbert* v. *Eyeman*, 434 F.2d 625 (9th Cir. 1970). Certainly an x-ray of his lower back might have been in order and other tests conducted that would have led to appropriate diagnosis and treatment for the daily pain and suffering he was experiencing. *Robinson* v. *Jordan*, 494 F.2d 793 (5th Cir. 1974); *Hutchens* v. *Alabama*, 466 F.2d 507 (5th Cir. 1972); *Bilton* v. *Beto*, 470 F.2d 988 (5th Cir. 1972).

The judgment is, therefore, reversed and the cause is remanded with instructions to re-instate the complaint, appoint counsel and permit appropriate amendment thereto to the end that Gamble's constitutional rights are fully protected and that he receives all legal relief to which he may show himself entitled.

Reversed and remanded.

UNITED STATES of America, Plaintiff-Appellee,

v.

William Ervin ALFORD and Jimmie Ellis Scott, Defendants-Appellants.

No. 74-3154.

United States Court of Appeals, Fifth Circuit.

July 30, 1975.

Defendants were indicted for conspiracy and possession and sale of untaxed liquor. After a mistrial was declared during the course of their first trial, defendants were convicted in the United States District Court for the Southern District of Alabama, Virgil Pittman, Chief Judge, and they appealed. The Court of Appeals, Goldberg, Circuit Judge, held that where defendants were mistakenly served with a one count indictment alleging 15 overt acts and only one defendant subsequently received the seven-count, twenty-one overt act indictment on which defendants were being tried, a declaration of mistrial as to the defendant who did not receive the indictment was proper but mistrial was improper as to the other defendant; and

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

October 2, 1975

TO ALL COUNSEL OF RECORD

No. 74-3727 - J. W. Gamble vs. W. J. Estelle,
Director, Texas Dept. of Corrections

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by Clerk's Office
Deputy Clerk

cc: Mr. J. W. Gamble
Mr. Daniel K. Hedges
Mr. Bert W. Pluymen

AFFIDAVIT

Before me, the undersigned authority, appeared Steve Renfrow, on this the 15th day of August, 1975, who after being by me first duly sworn upon his oath deposed as follows:

"My name is Steve Renfrow, and I am the administrative aide to Senator Chet Brooks, Chairman of the Joint Committee on Prison Reform, created by the 63rd Legislature of the State of Texas. In my capacity as administrative aide, I have personal knowledge of the Report from the Citizens Advisory Committee to the Joint Committee on Prison Reform.

Mr. Paul R. Gavia, Assistant Attorney General for the State of Texas, handed me the Brief for Appellant in cause no. 74-3727, filed in the United States Court of Appeals for the Fifth Circuit. I have had an opportunity to read and examine Appendix A to this Brief, which consists of a letter of transmittal to Senator Brooks and section 2 of the Report from the Citizens Advisory Committee to the Joint Committee on Prison Reform.

I wish to state that the Report as reproduced in Appellant's Brief was not prepared by the Joint Committee on Prison Reform of the Texas Legislature; that the Report was only one one of a series of working papers presented to the Joint Committee during the course of its deliberations; that the report was issued after an independent study by the Citizens Advisory Committee; and it was neither endorsed nor adopted by the Joint Committee or by the Texas Legislature.

Further deponeth sayeth not.

STEVE RENFROW

Sworn and Subscribed to before me by Steve Renfrow on this the 15th day of August, 1975.

Notary Public in and for the
County of Travis, State of
Texas

Supreme Court, U. S.
FILED
APR 30 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

* * *

Supreme Court of the United States

October Term, 1975

* * *

NO. 75-929

* * *

W. J. ESTELLE, JR., RALPH GRAY, AND H. H. HUSBANDS,

Petitioners

V.

J. W. GAMBLE,

Respondent

* * *

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

* * *

PETITION FOR CERTIORARI FILED DECEMBER 31, 1975

CERTIORARI GRANTED FEBRUARY 23, 1976

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RE-OPENED 10-23-75
IN FORMA PAUPERIS 74-H-777

CIVIL DOCKET CARL O. BUE, JR.
UNITED STATES DISTRICT COURT
Jury demand date:

TITLE OF CASE	ATTORNEYS
J. W. GAMBLE, #235667	
VS	
W. J. ESTELLE,	For Plaintiff:
DR. RALPH GRAY,	Pro se-
Medical Officer,	Dallas County
H. H. HUSBANDS,	Jail
Warden	500 Commerce St
	Dallas, Tex 75202
	For defendant:

* * *

DATE	PROCEEDINGS
6/10/74	(RJB) Memorandum and Recommendation of Magistrate. filed.
"	Complaint. filed.
"	(COB) Final Judgment. filed. (Parties Notified).
7-16-74	Petitioner's MOTION to Vacate Judgment of 6-10-74, filed. M/D: 8-5-74 by Clerk
7-16-74	Petitioner's Notice of Appeal, filed. (Copy mailed to Resp.)
7-16-74	Petitioner's Show Cause and Affidavit, filed
7-16-74	Petitioner's Affidavit of Service by Mail, filed.
8-1-74	Petitioner's Motion for leave to appeal in forma pauperis, filed.
8-12-74	(COB) ORDER, filed. (1) Pltf.

	Motion to Vacate Judgment-DENIED: (2) Permission DENIED to prosecute his appeal under Section 1915, Title 28, US Code. Parties notified by copy. rlo
8-12-74	(RJB) MEMORANDUM & RECOMMENDATION, filed.
8-23-74	Letter from Clerk, U.S.Ct. of Appeals, requesting entire original case file, rec'd & filed.
8-27-74	(COB) Order to send entire original case file to Ct.Appeals, filed. (File mailed to Ct. of Appeals, New Orleans, La.)
10-2-74	Entire original file returned from Court of Appeals.
10-2-74	Certified copy of Order Fifth Circuit GRANTING leave to appeal in forma pauperis and appointment of counsel on appeal, rec'd & filed.
10-2-74	Copies of Petitioner's Notice of Appeal, Show Cause & Affidavit, Motion to appeal in forma pauperis and appointment of counsel and Fifth Circuit Order mailed to Atty General of Texas
10-23-74	Record on Appeal consisting of all original papers mailed to U.S. Court of Appeals.
10-23-75	Original papers returned from Ct. of Appeals.
10-23-75	JUDGMENT (or Mandate) of Ct. of Appeals, rec'd. and filed. (Judgment of Dist. Court REVERSED and Case REMANDED for further proceedings in accordance with Opinion.)
10-23-75	Opinion of Ct. of Appeals rec'd. and filed.
1-8-76	Petitioner's Motion for Appointment of Counsel, filed. M/D 2-2-76 by clerk.

UNITED STATE DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION.

HOUSTON, TEXAS.

J.W GAMBLE #235677A
WALLS. UNIT. P.O. BOX 32,
HUNTSVILLE, TEXAS, 77340
IN PROPRIA PERSONAM.

COMPLAINT

CIVIL ACTION NO
(CIVIL RIGHT)

J.W. GAMBLE - PLAINTIFF

V.

W.J. ESTELLE JR. - DEFENDANTS, Director of the Texas Department of Corrections.
RAIPH GRAY MEDICAL DIRECTOR of the Texas Department of Correction.
H.H. Husbands Warden of walls Unit

CIVIL ACTION SUIT 42 U.S.C.A. SECTION 1983

TO THE HONORABLE JUDGE OF SAID COURT.

This is a civil action authorized By section 1983 to redress the deprivation under color of state law of right secured By the constitution of the united state. The court has jurisdiction under 28 U.S.C.A section 1343 plaintiff seek declaratory relief. pursuant to 28. U.S.C.A. section 2201 and 2202.

PLAINTIFF J.W. Gamble is and was at all time mentioned herein a prisoner of the state of Texas in custody of the Texas Department of Corection He is Currently confined in walls. unit Huntsville Texas.

DEFENDANT W.J. Estelle Jr. is the Director of the Texas Department of Corection of the state of Tex he is legally responsible for the overall, operation of the Department and each institution under Jurisdiction including the walls unit at Huntsville Texas, His address is Box 32 Huntsville Texas 77340

DEFENDANT DR. Ralph Gray is the medical Director of the Texas Department of correction. He is legally responsible for the overall operation of the Central Medical Department of the state Department of correction. His address is Box 32 Huntsville Texas 77340

DEFENDANT H. H Husbands is the warden of the Walls Unit, Huntsville Texas, He is legally responsible for the operation of the Walls Unit and for the welfare of all the inmate of that Prison His address is Box 32 Huntsville Texas 77340

FACTS

On or about 9th Day of November 1973 about 930 Am plaintiff was working for the Texas Department of correction plaintiff job assignment was at the textile mill Huntsville Texas working as a cotton picker machine operator, plaintiff was unloading cotton from a truck, the Bale of cotton weigh about 600 Pound each. plaintiff was flipping the cotton to the machine and the Bale of cotton fell flat plaintiff tried to keep the Bale of cotton from following flat the cotton fell on plaintiff, plaintiff lifted the Bale of cotton off himself and injury plaintiff lower Back.

Plaintiff work for about four more hour. operation the picker machine but didnot handle anny more Bale of cotton after four hour.- plaintiff got very stiff then plaintiff asked a officer at the textile mill for a pass to the unit hospital plaintiff went to the unit hospital and was checked By a medical assistance a caption Blunt Caption Blunt Check plaintiff for a Hernia But plaintiff didnot see a Doctor for his hurting caption Blunt didnot give plaintiff anny thing for plaintiff pain. Captain Blunt send plaintiff to the west Building 1604 were plaintiff was living. plaintiff was hurting so Bad, plaintiff return to unit hospital 8 hours late plaintiff seen a inmate nurse gave plaintiff two pain pill, finally plaintiff seen a Doctor.

On or about 10th Day of November 1973 at the unit hospital Doctor Name was Dr. astone, Name plaintiff and place plaintiff on callpass and callfed, callpass callfed is when plaintiff remain in his cell at all time. plaintiff was then move from west Building 1604 to first Building 31821 Doctor astone place plaintiff on Zoctirin II Tid x 10d and Robaxin II Tid x 7d. Dr. astone medical Record show that plaintiff Receive a lower Back strain plaintiff remain on callpass callfed for two days Enclose is exhibit (C)

On or about 12th Day of November 1973, plaintiff Return to unit hospital and seen a Doctor astone he place plaintiff on callpass callfed for another 7th days, plaintiff stand on same medicaleation as above plaintiff remain in cell except for shower [redacted] Doctor astone place plaintiff on lower Bunk for one week. But the Building Department didnot issue plaintiff lower Bunk. plaintiff remain at first Building 31821 on top Bunk. Enclose is exhibit (A) for Lower Back strain.

On or about 20th Day November 1973. Plaintiff return to unit hospital and seen a Doctor astone he place plaintiff on Robaxin II Tid x 7d and febridyne II Tid x 7d. for 7th days he place plaintiff on callpass for 7th days, callpass is when you remain in your cell at alltime except for eating and shower. plaintiff move from first Building 31821 to west Building 1489 Enclose is exhibit (B).

On or about 26th Day of November 1973 plaintiff Return to unit hospital for lower Back strain and seen a Doctor astone he place plaintiff on Zoctirin II Tid x 6d for five days also place plaintiff on 7th days callpass. callpass is when you go to eat and to shower. Enclosed is exhibit (D)

Doctor Gray gave plaintiff a test for high Blood - - - pressure, the first reading was 168 over 112 the Doctor place plaintiff on high blood pressure pill name ~~seraples~~ for 7th days and place plaintiff on a pain pill name febridyne Tid 10 for 7th days plaintiff remain in administrative segregation 32-A-7 fire Building.

on or about 13th Day of December 1973, plaintiff return to unit hospital for lower Back hurting and high Blood pressure reading plaintiff seen a Doctor gray after plaintiff was on high blood pressure pill name seraple for 7th days the reading was 152 over 98 Doctor gray place plaintiff on seraple pill for 30th days But some how the unit staff lost plaintiff prescription and didnot find the prescription until plaintiff return to the unit hospital on the 17th day of December 1973 But Doctor gray written the prescription on the 13th Day of December 1973 plaintiff remains in administrative segregation 32-A-7 fire Building.

on or about 17th day of December 1973, plaintiff return to unit hospital, plaintiff didnot a Doctor gray or anny other Doctor plaintiff seen a Caption Blunt medical assistance he place plaintiff on a pain pill name ~~Tegenales~~ for 7th days this pill is a muscle relaxer pill make the bottom of plaintiff stomach hurt plaintiff went to hospital for lower Back hurting, plaintiff remains in administrative - - - - segregation fire Building 32-A-7-1

on or about 27th day of December 1973, plaintiff return to unit hospital for lower Back hurting and didnot see Doctor Gray or anny other Doctor plaintiff seen a Caption Blunt medical assistance he gave plaintiff the ~~Tegenales~~ pill for 7th Days, plaintiff remains in administration segregation 32-A-7 fire Building.

on or about 3th day of December 1973, plaintiff return to unit hospital for lower Back strain. and seen a Doctor astone he taken plaintiff off callpass But left plaintiff on medicalation a pill name febridyne Tid x 7d. for 7th days, when your are taken off callpass that mean that you will do light work, plaintiff told Doctor astone that his lower Back was still hurting just as bad as the first day plaintiff was injured.

on or about 3th December 1973, plaintiff went to major muddat office, plaintiff told major muddat that plaintiff was still hurting from his lower Back strain and that plaintiff was not going to work hurting major muddat had plaintiff move from west Building 1489 to fire Building, 32-A-7 is in administrative segregation where plaintiff is now living,

on or about 5th Day of December 1973, plaintiff was taken in front of the unit disciplionary committee plaintiff told the committee that plaintiff was still hurting from lower Back strain and that the only thing that Doctor astone had did for his Back injury was to give plaintiff pain pill, plaintiff explain to the committee, that plaintiff was under Doctor astone care for 26th days and that Doctor didnot even notice that he suffer from high Blood pressure. The unit disciplinary committee didnot take any action against plaintiff, But send plaintiff to see another Doctor, plaintiff remain in administrative segregation at 32-A-7 fire Building.

on or about 6th day of December 1973 plaintiff went to the unit hospital and seen a Doctor Gray. Doctor Gray gave plaintiff a urinalysis test and a Blood analysis. that check ok Doctor gray medical Record show that plaintiff received a lower Back strain

on or about 3th day of January 1974, [redacted] Captain Linsley came by plaintiff cell 32-A-7 fine Building and asked plaintiff if plaintiff wanted to go to work plaintiff answered was that plaintiff wasnot going to work hunting captain linsey said I will send you to the farm. plaintiff remains in administrative segregation 32-A-7 fine Building

On or about 5th Day of January 1974, lieutenant Ramsey came by plaintiff cell 32A-7 fine Building and asked plaintiff if captain linsey had talk to plaintiff, plaintiff said yes then lieutenant Ramsey asked plaintiff if plaintiff wanted to go to work, plaintiff told him that plaintiff was not going to work hunting lieutenant Ramsey said I will send you to the farm. plaintiff remains in administrative segregation 32A-7 fine Building

On or about 7th Day of January 1974, plaintiff asked to go on sick call about 8:00 in the morning But at 12 noon officer [redacted] return and told plaintiff that he couldnot make sick call, plaintiff was going on sick call for his lower Back hurting and for migraine headaches.

On or about 7th Day of January 1974 plaintiff finely made it to the Unit hospital about 3 Pm that Evint plaintiff went to hospital for lower Back hurting and migraine headaches and for high Blood pressure plaintiff didnot see Doctor Hray or anny other Doctor plaintiff saw a Captain Blunt he gave plaintiff a pill name ~~sodium salicylate~~, T x 7 D. for 7th days and serapes Td. for 30th days captain Blunt is a medical assistance plaintiff remains in administrative segregation 32A-7 fine Building

on or about 17th Day of January 1974 plaintiff went to unit hospital for lower Back hurting and stomach pain plaintiff didnot see Doctor Hray or anny other Doctor plaintiff saw a Captain Blunt medical assistance he gave plaintiff a pill name sodium salicylate T x 7 for 7th days plaintiff remains in administrative segregation 32A-7 fine Building.

On or about 29th day of January 1974, plaintiff went to the unit hospital for lower Back hurting plaintiff didnot see a Doctor Hray or anny other Doctor plaintiff saw a Captain Blunt medical assistance he gave plaintiff a pill name sodium salicylate T x 7 for 30th Days for lower Back hurting plaintiff remains in administrative segregation 32A-7. fine Building.

On or about 31th day of January 1974 plaintiff was Brought in front of the unit disciplinary committee for charges on the above date of January 5th day 1974 plaintiff told the committee that plaintiff was not going to work hurting in Captain Linsey Report didnot state that plaintiff had told him, captain Report left out that plaintiff was hurting.

plaintiff told the committee that plaintiff lower Back was still hurting. plaintiff also explain to the committee that he suffer from high Blood pressure But the committee find plaintiff guilt and put plaintiff into solitary confinement. no Doctor or doctor aid or medical personnel checked Before putting plaintiff into solitary confinement plaintiff was move from 32A-7 to 3102 fine Building plaintiff cod C72-116-20-HN is still on appeal and have not made it to the Court of Criminal appeal in austin texas yet.

the unit disciplinary committee call. caption Blunt. medical assistance. he told the committee that plaintiff medical class was still first class this was on the 31th day of January 1974. plaintiff have Received a Back injury and suffer from high Blood pressure and heart trouble But plaintiff is still in first class. plaintiff when he first was placed in the Texas Department of correction Diagnostic center the first thing plaintiff did was to tell the Doctor that plaintiff suffer from high Blood pressure. plaintiff remains in ---- solitary confinement.

~~on or about 4th day of February 1974~~, S... asked officer Rational could plaintiff see a Doctor about 8.am. that morning plaintiff was having chest pain. and plaintiff was having blank out. the ~~sargent~~ on duty said that he would have to check with the ~~warden~~ office. Because all inmate in solitary confinement would have to go throught the warden Before he could see a Doctor about 2 P.M. that evening ~~sargent~~ thance came on. he call the unit hospital. finely about 7:30 P.M. that night a medical personnel checked plaintiff and place plaintiff in the Unit hospital for chest pain and high Blood pressure.

~~on or about 5th day~~ February 1974. plaintiff saw. a Doctor HEATON interpretation of E.K.G. as follows: multipul. unifocal P.V.C.'s S-(Re-entry often), inverted T wave, A.V.R. - lead 3 (normal), elevated "P" wave. on the 6th day February 1974 plaintiff was move from hospital to 32A 20. five Building plaintiff remains in administrative segregation. Doctor Heaton place plaintiff on a pill name quinidine tid x 3 for 3th days.

~~on or about 7th day of February 1974~~ plaintiff asked officer ~~spencer~~ and officer ~~Rational~~ -- could plaintiff go on sick call for my lower Back was hurting and plaintiff was having chest pain and plaintiff left arm hold the shoul pain at plaintiff chest did this was about 8 A.M. in the morning plaintiff is in administrative segregation 32 A 20 five Building. and cannot see a Doctor unless a officer take you, and they didnot take plaintiff on this days,

Plaintiff was discharge from the unit hospital the 6th day of February 1974 But plaintiff was still having chest pain when plaintiff was discharge,

~~on or about 8th day of February 1974~~ plaintiff asked officer ~~spencer~~ and officer ~~Rational~~ could plaintiff go on sick call. about 8 A.M. in the morning about 12 noon officer ~~spencer~~ return and said they didnot want plaintiff to go on sick call he gave plaintiff no Reason why plaintiff could not go on sick call plaintiff was going on sick call for chest pain and lower Back hurting plaintiff is also having Blank out when plaintiff stand up plaintiff is in administrative segregation 32 A 20 five Building and cannot see a Doctor unless an officer take you and they didnot take plaintiff on this days.

~~on or about 9th day of February 1974~~ plaintiff asked officer spencer again could plaintiff go on sick call for chest pain, finally they let plaintiff go on sick to the Unit hospital, Doctor Heaton place plaintiff on a chest pill name quinidine Tid x 3 for 3th days plaintiff remains in administrative segregation 32 A 20 five Building

LEGAL CLAIMS

Plaintiff has receive a physical Back injury Defendant Responsible W.J. Estelle Jr. Director of the Texas Department of Correction Box 32 Huntsville Texas, he is Responsible for all industrial mechinsary and work in the Textile mill where plaintiff receive Back injury.

plaintiff, hasdenot done anmything wrong to plaintiff, knowlage plaintiff is Being Discrimination against and Privileges Taken away that is guaranteed by fourteenth amendment,

Defendant Responsible H.H. Husbonds warden of the Wall unit Box 32 Huntsville Texas, he is also Responsible for sufficient man powder to conduct work safely in the Textile mill area, and due to innsufficent man power plaintiff sustain Back injury, also defendant failure to provide medical care needed by plaintiff. J.W. Homble, Constituted, cruel and unusual punishment and punishment without due process of law, that is guaranteed by fourteenth amendment. also the eight amendment United state constitution

plaintiff has, receive inadequate medical treatment for plaintiff injury.

Defendant Responsible Dr. Ralph Hoag medical Director of the Texas Department of Correction Box 32 Huntsville, Texas, he is also Responsible for medical facilities at the walls unit where plaintiff is presently Being treated for Back injury that plaintiff sustain in the Textile mill at the walls unit Huntsville Texas plaintiff also Being treated for high Blood pressure and Heart truble,

plaintiff in this action does not complain about the validity of his confinement but instead, plaintiff complain about the wrong committed By the three defendant about, which caused the plaintiff to suffer mental anguish.

Defendant W.J. Estelle Jr. failure to provide medical care needed By plaintiff J.W. Homble constituted cruel and unusual punishment and punishment without due process of law, of the fourteenth amendment, also the eight amendment U.S. constitution

Defendant Dr. Ralph Hoag failure to provide medical care needed By plaintiff J.W. Homble constituted cruel and unusual punishment and punishment without due process of law of the fourteenth amendment, also eight amendment U.S. constitution

So the Honorable judge of said court if plaintiff donot answered show cause order in the time Required it will Be that defendant W.J Estelle Jr at member of his staff would have plaintiff in solitary confinement with the door closed and they will not let plaintiff used the writ room o let plaintiff mail show cause order out.

Wherefore plaintiff respectfully prays that this court enter judgment granting plaintiff.

① Declaratory judgment that the defendant acts policies and practices described herein violate plaintiff right under the United State Constitution

② a preliminary and permanent injunction which

Ⓐ prohibits the defendant their successors in offic agents and employees and all other persons in actied concert and participation with them from horassing threatening punishing or --- retaliating in any way against plaintiff Because he filed this action.

Ⓑ prohibits defendant W.J. Estelle Jr and H.H. Husbonds from transferring plaintiff to any other institution without that plaintiff express consent during the pendancy of this action

© Require defendant W.J. Estelle Jr. member to remove from plaintiff prison files any write up or other report concerning this events discribed herein and references to plaintiff possession of revolutionary literature and prohibits H.H Husbonds from permitting any reports to be placed in plaintiff files at ahy future time.

③ Trial By Jury all issues triable By Jury.

④ plaintiff cost of this suit

⑤ Compensatory Damages in the amount of. 100,000. Dollars to plaintiff from each defendant W.J. Estelle Jr. and Doctor Ralph Gray and H.H. Husbonds.

⑥ Punitive Damages in the amount of. 25,000. Dollars to plaintiff from each defendant W.J. Estelle Jr. and Doctor Ralph Gray and H.H. Husbonds.

⑦ Such other and further relief as this court may deem just. proper and equitable

⑧ plaintiff move this court for an order permitting them to file this action in forma--- pauperis without prepayment of fee and costs or security therefor and appointing Tom. M. Shaw. 1412. Main Street Dallas Texas 75202 a member of the Texas Bar to represent plaintiff as provided in 28 U.S.C. section 1915 and 18. U.S.C section 3006 A (G) Because as their---- attached affidavits indicate plaintiff are unable to pay such costs or Give security therefor and cannot afford to employ on attorney. this motion is Base on the complaint affidavits and memorandum of law. Subitted herewith.

Respectfully Submitted

J. W. Stemple

J. W. Stemple 235677-A
Walls Unit P.O. Box 32
Huntsville Texas 77340
In forma pauperis Papers

Subscribed and sworn to
Before me this 21 of Dec 19 72

Notary Public in and for
Walker County Texas

CLERK, U.S. DISTRICT
COURT, SOUTHERN
DISTRICT OF TEXAS
FILED JUN. 10, 1974
V. BAILEY THOMAS, CLERK
BY DEPUTY E. KNOBLAUCH
/s/

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. W. GAMBLE,	X	
	X	
Plaintiff,	X	
	X	
vs.	X	C.A. NO. 74-H-777
	X	
W. J. ESTELLE, JR., Director, Texas Department of Corrections; RALPH GRAY, Medical Director, Texas Department of Corrections; and H. H. HUSBANDS, Warden, Walls Unit, Texas Department of Corrections,	X	
	X	
Defendants.	X	

June 6, 1974

MEMORANDUM AND RECOMMENDATION:

Plaintiff, an inmate in the Texas Department of Corrections, brings suit for declatory and injunctive relief as

well as for damages under the Civil Rights Act complaining that the named defendants have denied him adequate medical attention for a back injury incurred during a work assignment. Plaintiff further requests a jury trial, appointment of counsel, and permission to proceed in forma pauperis.

With respect thereto, it is RECOMMENDED as follows:

1. Permission to file in forma pauperis, in this Court only, be granted;

2. The Clerk be required to file this petition;

3. Plaintiff's request for appointment of counsel be denied;

4. This cause of action be dismissed for the failure of plaintiff to state a claim that would entitle him to relief under the Civil Rights Act.

It is clear that prison inmates are entitled to adequate medical care and treatment. State officials of necessity

are vested with broad discretion in determining the nature and character of medical treatment to be afforded prison inmates and the federal courts are reluctant to interfere unless there is shown exceptional circumstances demonstrating an abuse of that discretion. Lawrence v. Wainwright, 440 F.2d 379 (5th Cir. 1971).

It is within the context of these well established general principles that the undersigned reviewed and considered plaintiff's bare assertions of medical deprivation. Apparently in November 1973, the inmate incurred a low back injury when a heavy bale of cotton fell on him while he was working in the textile mill at the Department of Corrections. The plaintiff then details a program of medical treatment, examinations by prison doctors, hospitalization and medical lay-inns he received on approximately 24 separate occasions between the date of the injury

and extending into early this year.

The undersigned, by letter dated February 15, 1974, requested the plaintiff to clarify and particularize his allegations of deprivation in view of the program of treatment outlined in his pleadings. His response did not do so.

The plaintiff's allegations were again reviewed and are, in the judgment of the undersigned, insufficient to cause a federal court to interfere with the broad discretion permitted the prison officials in affording medical treatment to inmates in their trust.

For the foregoing reasons, it is RECOMMENDED that this cause of action be dismissed.

DONE at Houston, Texas, on this 6th day of June, 1974.

RONALD BLASK, UNITED STATES MAGISTRATE
/s/

CLERK, U.S. DISTRICT
COURT, SOUTHERN
DISTRICT OF TEXAS
FILED JUN. 10, 1974
V. BAILEY THOMAS, CLERK
BY DEPUTY E. KNOBLAUCH
/s/

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. W. GAMBLE,	X	
	X	
Plaintiff,	X	
	X	
vs.	X	C.A. NO. 74-H-777
	X	
W. J. ESTELLE, JR., Director, Texas Department of Corrections; RALPH GRAY, Medical Director, Texas Department of Corrections; and H. H. HUSBANDS, Warden, Walls Unit, Texas Department of Corrections,	X	
	X	
Defendants.	X	

FINAL JUDGMENT

For reasons set forth in the United States Magistrate's Memorandum and Recommendation, signed on June 6, 1974, it is ORDERED that said Recommendation be and the same is hereby adopted as the Court's

Memorandum and Order.

1. Leave to proceed in forma pauperis, in this Court only, is granted;

2. The Clerk is required to file this petition;

3. Plaintiff's request for appointment of counsel is denied;

4. This cause of action is hereby dismissed for failure of plaintiff to state a claim upon which he would be entitled to federal relief under the Civil Rights Act.

DONE at Houston, Texas, on this 10th day of June, 1974.

UNITED STATES DISTRICT
JUDGE, CARL O. BUE, JR.
/s/

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED AUG. 12, 1974
V. BAILEY THOMAS, CLERK BY
DEPUTY R. O'QUINN /s/

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. W. GAMBLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 74-H-777
W. J. ESTELLE,	)	
Director, Texas	)	
Department of	)	
Corrections, ET AL,	)	
	)	
Defendants.	)	

J. W. GAMBLE, pro se.

John L. Hill, Attorney General of Texas, Larry F. York, Assistant Attorney General of Texas, Austin, Texas, for defendants.

O R D E R

Before this Court for consideration is Plaintiff's Motion to Vacate Judgment. After due consideration, the motion is denied.

Plaintiff is hereby denied permission to prosecute his appeal in this

case under Section 1915, Title 28, United States Code, since this Court believes that said appeal is lacking in merit and, as a result, is not taken in good faith.

DONE at Houston, Texas, this 12th day of August, 1974.

CARL O. BUE, JR.
UNITED STATES DISTRICT
JUDGE /s/

J. W. GAMBLE, Plaintiff-Appellant,
v.
W. J. ESTELLE, Director, Texas Department of Corrections, Defendant-Appellee.

No. 74-3727.

United States Court of Appeals,
Fifth Circuit

Aug. 4, 1975.

Daniel K. Hedges, Houston, Tex. (Court appointed), for plaintiff-appellant.

John L. Hill, Atty. Gen., Bert W. Pluymen, Asst. Atty. Gen., Austin, Tex., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Associate Justice,* and GOLDBERG and AINSWORTH, Circuit Judges.

PER CURIAM:

Appellant J. W. Gamble is presently incarcerated in the Walls Unit of the Texas Department of Corrections. On May 30, 1974, he requested leave to file this civil rights action against three officials of the Texas Department of Corrections, appellees, under 42 U.S.C. § 1983, 28 U.S.C.A. §§ 2201 and 2202, alleging in a 24-page handwritten complaint "failure to provide medical care needed", in that "the only thing that [appellees] had did for his back injury [suffered while imprisoned] was to give [him] pain pills."

Gamble, it appears, was injured on November 9, 1973, when a 600-pound bale of

cotton fell upon him during a prison work assignment at the prison textile mill in Huntsville, Texas. A United States Magistrate, without requesting a reply from the State officials, recommended, and the United States District Judge ordered, the following: (1) that permission to file the case be granted; (2) that the petition be filed; (3) that the request for appointment of counsel be denied; and (4) that the cause of action for injunction and damages be dismissed for failure to state a claim under the Act. After a motion to vacate this order and a request to prosecute this appeal was denied, this court granted Gamble's application for leave to appeal in forma pauperis and for the appointment of counsel.

The state officials contend that Gamble was not refused medical treatment, that the doctors applied the proper diagnostic techniques, and that the complaint did not allege any exceptional circumstances warranting judicial inquiry. We find the complaint sufficient in alleging that the action of the authorities was tantamount to a refusal of medical treatment and remand the case for further action in the light of this opinion.

I.

At the outset, we note that the State admits that Gamble, a prison inmate, was working in the textile mill by assignment of the appropriate official when he was injured. Gamble alleges that his injury was "due to insufficient manpower" at the installation and was aggravated by "failure to provide medical care needed . . . " It appears that appellant

*Of the Supreme Court of the United States (Retired) sitting by designation.

was unloading a truck when the injury occurred and that the continued to work for some four hours thereafter operating the "picker machine." Later he became stiff and requested a pass to the unit hospital, which was granted. At the hospital he was given a checkup for hernia ba a medical assistant and was sent back to his cell. Two hours later, his pain had become so intense that he returned to the hospital and was initially seen by a nurse who gave him two pain pills, and later by a doctor who examined him but have him no treatment. On November 10th, he was examined by a doctor who diagnosed the injury as lower back strain and prescribed Zactrin and Robaxin for the pain. The doctor placed him on a cell-pass cell-feed routine, in which the inmate remains in his cell at all times, save to make his toilet, and Gamble was moved from his original cell to Building No. 5. On November 12th and 19th, Gamble-at his request-again saw the same doctor, complaining of continued pain, but in each instance the only prescription given was pain pills and the cell-pass cell-feed routine. On November 26th, Gamble again returned to the hospital with the same symptoms, and the same doctor gave the same prescription, except that in addition he directed that Gamble's bunk be changed from the top to the lower tier for one week. This direction, it appears, was never effected.

On December 3rd, Gamble was seen by the same doctor who took him off the cell-pass cell-feed routine and concluded that he was able to engage in light work, despite Gamble's statement that his back was still hurting just as bad as the first day it was injured. More pain pills were prescribed. Later during the same day,

Gamble advised the prison adminstrative office that he was still hurting from his back injury and could not perform work. He was then placed in "administrative segregation" (i.e., solitary confinement) in Building No. 5, and on December 5 was taken before a prison disciplinary committee. He advised the committee, as he stated in his pro se petition, that he "was still hurting from lower back strain and that the only thing the doctor had did for his back injury was to give plaintiff pain pills." He further advised them that, although he had been under the doctor's care for some 26 days, the doctor had never noticed that he was suffering from high blood pressure; whereupon the Committee directed that he be examined by another doctor.

Gamble remained in "administrative segregation" throughout the months of December and January. On December 16th, he was examined by another doctor, who found his blood pressure to be 168 over 112, and he was given high blood pressure pills and pain pills for seven days. On December 13th, appellant again saw the second physician who renewed the same prescriptions for a 30-day period. On December 17th, appellant complained again of back pain and was given a prescription by a medical assistant. The same prescription was renewed for another week on December 27th.

On January 3, 1974, a prison officer asked Gamble if he wanted to go to work, to which appellant replied that "he was not going to work hurting". The officer stated that he would send appellant to the prison work farm. On January 5th, another officer threatened him with a transfer to the farm again. On January 7th, about 8:00 a.m., Gamble asked to be allowed to go on sick call for his back pain and

migraine headaches, but it was not until 3 p.m. that his request was granted, and he was not allowed to see a doctor. A medical assistant gave him a week's supply of mild pain killers and a 30-day supply of high blood pressure pills. The issuance of pain pills was repeated on January 17th and January 25th.

On January 31st, Gamble was again brought before the disciplinary committee on the January 5th charge of refusing to work. The medical assistant told the committee that appellant's health was "first class", despite appellant's statement to the committee that his "lower back was still hurting" and that he suffered from high blood pressure. No physical examination whatever was given appellant for this hearing. The committee found him guilty and placed him in solitary confinement. Five days later-while still in solitary -at about 8 a.m. Gamble asked a guard if he could see a doctor because he was experiencing "chest pain" and, in appellant's words, "blank-outs". According to appellant, the sergeant on duty reported that, for inmates in solitary, such a request would have to be approved by the warden's office. Finally, about 7:30 p.m., a medical assistant checked Gamble and put him in the hospital for "chest pain and high blood pressure." The next day he was examined by a doctor, and Gamble's electrocardiogram was interpreted as follows: multiple unifocal P.V.C., S(re-entry often), inverted T wave, A.V.R.-lead 3 (normal), elevated P wave. On the following day, February 8, 1974, he was placed on quinidine, a heart relaxant, for three days. He was discharged from the hospital, although he still had chest pain which extended into his left arm, and returned

to solitary.

On February 8, 1974, appellant asked a guard if he could go on sick call, complaining of lower back pain, chest pain, and blackouts when he stood up. The guard went to check and, on his return, told appellant the prison officials did not want him to go on sick call. The next day appellant again complained of chest pain and saw the doctor who had previously given him the EKG at the unit hospital and who continued the quinidine prescription for another three days. On February 11, 1974, appellant signed the complaint, the dismissal of which is the basis of this appeal.

II.

Federal courts have traditionally been reluctant to interfere with the administration of prison systems, especially those of the States; nevertheless, we note that there has been a steady increase of cases in the federal courts involving attacks on the medical, as well as the disciplinary, procedures followed in prisons. While the bench has time and time again suggested that administrative procedures be established to handle complaints such as the one Gamble presents here, the response from the States has been minimal. As a result, we are obliged to hear and decide such cases under somewhat broad constitutional principles.

In considering pro se applications under Section 1983, we invariably find that prisoners-who are illiterate and unable to express themselves in the clear and unequivocal language required in legal pleadings-have been required to write out the complaints themselves, largely in long hand and with no knowledge whatever of the legal procedures

involved. Consequently, we read such complaints with liberality and to the facts alleged, take the facts as true in cases such as the one here, and examine the record with special care and scrutiny. Though we are pleased to see from the State's brief before this court that it agrees with these standards, we again express regret that it has not yet established the sort of administrative procedures in its criminal justice system which would have obviated the filing of cases such as this one.

On the merits, the State says that the complaint here alleges neither a deprivation of medical care nor inadequate medical treatment under such exceptional circumstances as to permit federal intervention. See Coltner v. Rhay, 371 F.2d 420 (9th Cir. 1967); Freeman v. Lockhart, 503 F.2d 1016 (8th Cir. 1974); Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972); Thomas v. Pate, 493 F.2d 151 (7th Cir. 1974); and Fitske v. Shappell, 468 F.2d 1072 (6th Cir. 1972). The Magistrate based his recommendation to dismiss on the proposition that the complaint must allege an "abuse of discretion by state prison authorities in providing medical treatment for prisoners." Lawrence v. Wainwright, 440 F.2d 379, 380 (5th Cir. 1971). We do not find any of these cases controlling here, for we think that appellant's complaint should be read to state a cause of action.

District courts must be sensitive to the problems of the pro se plaintiff in civil rights actions and not be too quick to dismiss for failure to state a technical cause of action. See, e. g., Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); Wilbron v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975). While this complaint is not

framed in terms of the cases cited by appellees, in part because Gamble is "unschooled" in the law, see Granville v. Hunt, 411 F.2d 9, 10 (5th Cir. 1969), such a situation calls for even greater liberality on the part of the district court, in our view, where the State has not been required to file any pleading whatever. Moreover where the general medical services afforded by the State in its prisons are publicly known to be "woefully inadequate"[1], the court must exercise the highest degree of care to make certain that a prisoner is not deprived of his federally secured constitutional right to medical care.

[1] See Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, filed on November 25, 1974, in Appellant's Brief, App.A, at A2-A26. The Committee found: "Even a cursory review of the Texas Department of Correction's medical program discloses extremely serious inadequacies. There is a serious shortage of trained and competent medical personnel-doctors, nurses, and technicians. At various times during our study of TDC, there were from one to three full-time doctors on the staff; their services are supplemented by use of a number of part-time physicians from the Huntsville area and localities near other units. But this is still not enough. [The TDC Medical Director] has administrative and supervisory responsibility for all medical care for the entire system of 17,000 inmates * * * [T]he two other full-time doctors have resigned, leaving the already overworked [Director] to bear sole full-time responsibility for 17,000 inmates. * * * [T]he demands are many times in excess of one man's capabilities." Id. at A5-A6.

As we read the pleading here, the State not only failed to diagnose Gamble's lower back injury which he suffered while in the performance of work required by it, but the State has totally failed to provide adequate treatment of that condition. Again and again, as the complaint makes clear, the only medication prescribed was to relieve the pain, not to cure the injury; indeed, the exact nature of the back injury remains unknown. Certainly the pain pills had no curative effect, even though they were administered for some 3 months. Moreover, Gamble still has his high blood pressure, "blank outs", and heart disease. And what makes this all the more disconcerting is the fact that he has spent months in solitary confinement without medical care and stands a good chance of remaining that way without intervention.

We can only conclude that Gamble has stated an actionable claim under Section 1983 for inadequate medical care. See Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974); Tolbert v. Eyeman, 434 F.2d 625 (9th Cir. 1970). Certainly an x-ray of his lower back might have been in order and other tests conducted that would have led to appropriate diagnosis and treatment for the daily pain and suffering he was experiencing. Robinson v. Jordan, 494 F.2d 793 (5th Cir. 1974); Hutchens v. Alabama, 466 F.2d 507 (5th Cir. 1972); Bilton v. Beto, 470 F.2d 988 (5th Cir. 1972).

The judgment is, therefore, reversed and the cause is remanded with instructions to re-instate the complaint, appoint counsel and permit appropriate amendment thereto to the end that Gamble's constitutional rights are fully protected and that he receives all legal relief to which he may show himself entitled.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA.
70130
TELEPHONE
504-589-6514

October 2, 1975

TO ALL COUNSEL OF RECORD

No. 74-3727 - J. W. Gamble vs. W. J. Estelle, Director, Texas Dept. of Corrections

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition () for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by Clare F. Sachs /s/
Deputy Clerk

cc: Mr. J. W. Gamble
Mr. Daniel K. Hedges
Mr. Bert W. Pluymen

Supreme Court, U. S.
FILED
JAN 19 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-929

W. J. ESTELLE, JR., RALPH GRAY,
AND H. H. HUSBANDS,

Petitioners,

v.

J. W. GAMBLE,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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v.

J. W. GAMBLE,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondent, J. W. Gamble, respectfully prays that this honorable Court deny the petitioners' request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 4, 1975.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case presented in petitioners' brief with two exceptions. First, it should be stressed that prior to dismissal of Mr. Gamble's cause of action by the United States District Court for the Southern District of Texas, Houston Division, petitioners did not even condescend to file an answer, and no discovery whatsoever had taken place. Second, respondent thoroughly

disagrees with the remark on page four of petitioners' brief that the decisions below and the decision of this Court "depend entirely upon the *facts* alleged by Respondent in his complaint . . ." The decision of the Fifth Circuit turned on the failure of the district court to require an answer and at least enough discovery to provide the facts necessary to determine whether Mr. Gamble has stated an actionable claim. This critical and decisive flaw in petitioners' entire approach will be discussed in the arguments below.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Disagree With Licensed Physicians As To Diagnosis, And, Therefore, Does Not Conflict With The Decisions Of Any Other Courts Of Appeals.

A. *Respondent's complaint alleges a failure to diagnose, not a simple disagreement as to the result of a diagnosis.*

In *Haines* v. *Kerner,* 404 U.S. 519, 520 (1972), the Supreme Court noted that it holds *pro se* complaints to a less stringent standard from formal pleadings drafted by lawyers. It is clear from J. W. Gamble's petition that he is not only unschooled in the law but also unable to spell, punctuate, or construct a sentence. Admittedly this makes the petition difficult to read and interpret. However, such difficulty calls for even greater liberality and care in scrutinizing the petition than would be accorded a well-drafted pleading.

When ruling on a motion to dismiss a complaint under FED.R.CIV.P. 12(b), a court must accept the allegations of the complaint as true. *Cooper* v. *Pate,* 378 U.S. 546 (1964). Unquestionably the allegations must also be accepted as true when the trial court considers dismissal on

its own initiative before even receiving any motions from defendants. Also, appellate courts should scrutinize dismissal of civil rights actions with special care. *Lucarell* v. *McNair,* 453 F.2d 836, 838 (6th Cir. 1972). Similarly, before a magistrate recommends dismissal or a trial judge adopts such a recommendation each should carefully scrutinize the factual allegations of the *pro se* civil rights petition. Most important, a *pro se* 1983 action should not be dismissed on the pleadings unless "it appears 'beyond doubt' that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines* v. *Kerner, supra,* at 596.

In short, when summary dismissal is contemplated, *pro se* civil rights petitions should be read liberally as to form, scrutinized carefully as to facts, all allegations must be accepted as true, and the complaint cannot be dismissed unless no facts could be proved under it which would state a claim. Petitioners and the Fifth Circuit agree that this is the proper standard to apply. *Gamble* v. *Estelle,* 516 F.2d 937, 940 (5th Cir. 1975). If this standard had been applied by the magistrate and the district judge in the present case, the action could not have been summarily dismissed. It was the trial court's failure to apply this standard, *not* a disagreement with a doctor's diagnosis which led to the Fifth Circuit's decision.

It is absolutely essential that this Court keep in mind that no discovery whatsoever has taken place in this action. In their brief in support of their petition for certiorari petitioners have argued as though evidence was received as to the diagnostic tests performed on Gamble and as to the results of such tests. To the contrary, the record gives no indication at all of what tests, if any, were administered.

Petitioners admitted in their brief before the Fifth Circuit that:

> The complaint contains no allegations of the type of examination conducted by Dr. Astone which led to his diagnosis of the injury as a lower back strain. (Appellees' Fifth Circuit Brief, p. 18).

Petitioners' brief before this Court seriously misrepresents the diagnostic efforts of Dr. Gray. An examination of pages four and five of the appendix to petitioners' brief strongly indicates that Dr. Gray performed the urinalysis and blood analysis in connection with Gamble's heart and blood pressure problems, *not* in connection with his back injury. Gamble's lawsuit is based solely on the lack of diagnosis and inadequate treatment of his back injury. Furthermore, the statement, "Doctor Gray medical Record show that plaintiff Receive a lower Back strain" (Petitioners' Appendix, p. 4), probably refers to Dr. Astone's diagnosis which had been entered in Gamble's medical record. Like every other fact question in this case, that ambiguity could be clarified only by an examination of Gamble's medical record, an examination which has not yet taken place.

One *fact* which is clear from Gamble's complaint is that he is still suffering from pain in his lower back. Petitioners argue that the pain *may* result from Gamble's self-imposed bed rest; that his inverted T waves *may* result from anxiousness; and that his elevated P waves *may* be caused by hypertension. (Petitioners' brief, p. 10). This is all sheer speculation. Petitioners may be able to prove these theories through discovery or at trial. Respondent may be able to prove otherwise.

In summary, the record is totally void of any indication of what diagnostic tests, if any, were performed on Gamble. Therefore, there is really no substantiated diagnosis with which the Fifth Circuit could disagree if it

wanted to. The Fifth Circuit did not "[suggest] that X-rays and other tests should have been conducted." (Petitioners' brief, p. 10). Rather, they stated that:

> Certainly an x-ray of his lower back might have been in order and other tests conducted that would have led to appropriate diagnosis and treatment for the daily pain and suffering he was experiencing.

Gamble v. *Estelle*, *supra*, at 941. Through discovery Gamble may be able to prove that he had no diagnostic tests at all. Therefore, it does not appear " 'beyond doubt' that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines* v. *Kerner*, *supra*.

B. *The decision below is not in conflict with the decisions of other courts of appeals.*

Respondent fully agrees with petitioners that:

> A difference of opinion between a physician and a patient does not give rise to a constitutional right or sustain a claim under § 1983.

Coppinger v. *Townsend*, 398 F.2d 392, 394 (10th Cir. 1968). However,

> . . . to the extent that the petitioner alleges a *present* daily lack of medical attention and medication which both produces intolerable pain and further shortens his life expectancy, dismissal on the pleadings was improper regardless of the medical strength of the showing made by the State as to *past* medical efforts.

Hutchens v. *Alabama*, 466 F.2d 507, 508 (5th Cir. 1972). Gamble has alleged a denial of a diagnosis, not a disagreement with a course of treatment. Therefore, petitioners' cases are inapplicable and the Fifth Circuit's decision does not conflict with the decisions of other circuits.

II. The Decision Below Does Not Designate The Federal District Courts As Medical Review Boards For Physicians In Correctional Institutions.

Petitioners' allegation that the decision below designates the federal district courts as medical review boards not only is frivolous but also represents a tragically callous attitude on the part of the State of Texas toward its prison populace. The basis of the Fifth Circuit's decision was not a disagreement with what may have been done by the prison doctors but a need to find out what, in fact, the doctors did do. The Court did not prescribe a course of medical action, as petitioners allege. (Petitioners' brief, p. 13). The only thing which the Court did, was to find that under the facts alleged in Gamble's petition it was not clear beyond doubt that Gamble could prove no set of facts in support of his claim which would entitle him to relief. *Haines* v. *Kerner*, *supra*.

Petitioners' second point in their brief extends to an absurd degree the concept that a difference of medical opinion does not constitute a cause of action under 42 U.S.C. § 1983. Their mistaken version of the rule would deny a prisoner-patient his cause of action if he ever saw a prison doctor. Under this approach the federal trial court would have to dismiss even claims such as that in *Robinson* v. *Jordan*, 494 F.2d 793 (5th Cir. 1974). In *Robinson*, the prisoner complained of rectal pains and a digital examination was made. The prison doctor diagnosed the problem as hemorrhoids and prescribed suppositories. For six months the pain persisted but the prison doctors refused to take x-rays and continued to prescribe suppositories. Finally, it was determined that the prisoner had advanced rectal cancer and a colostomy was performed. Under petitioners' rule, Gamble will have to come into court in a

wheelchair as a paraplegic before he will be recognized to have even stated a claim against the Texas prison system.

On page fourteen of their brief, citing *Procunier* v. *Martinez*, 416 U.S. 396 (1974), petitioners state the true essence of their case. They are afraid of the workload the Attorney General's office will face if they are required to respond to cases such as Gamble's. Obviously they would prefer to simply ignore these cases, conduct no discovery, and not even file answers. Of course, they couch this argument in terms of a flood of litigation into the courts.

This is a very real problem and it was addressed by Justice Clark and Judges Goldberg and Ainsworth during the oral argument of this case. They pointed out to the Assistant Attorney General that cases such as Gamble's would not arise if the Texas prison system offered adequate medical care. On the one hand, the State of Texas is responsible for Gamble's claim because of the inadequate medical care its prisons gave him. On the other hand, the State then comes before the federal courts and asks that Gamble's case be summarily dismissed because there are simply too many cases like it for the Attorney General's office to handle. This is no solution.

First, the medical program of the Texas Department of Corrections must be upgraded so that prisoners receive adequate medical care. Second, the Texas prison system should institute a program such as that in the federal prison system to distinguish between meritorious and non-meritorious claims of inadequate care. Whatever the solution may be, it does *not* lie in summarily dismissing valid claims by prisoners because there are too many such claims. The absence of logic and the presence of cruelty and callousness in such an approach is obvious.

III. The Fifth Circuit Did Not Determine Any Ultimate Issue In The Case On The Basis Of Hearsay Evidence Presented At The Appellate Level.

The opinion below states:

> Moreover where the general medical services afforded by the State in its prisons are publicly known to be 'woefully inadequate', the court must exercise the highest degree of care to make certain that a prisoner is not deprived of his federally secured constitutional right to medical care.

Gamble v. *Estelle, supra,* at 940. The Court cited the 1974 Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature as but *one example* of this public knowledge. Public knowledge of the inadequacies of the Texas prison system is widespread and those inadequacies are encountered and examined by the judges of the Fifth Circuit numerous times each term through appeals of suits such as Gamble's. To argue that the Court's comment was based solely on the Citizens Committee Report is to ignore the widespread publicity concerning the inadequacies of medical care in the Texas prisons.

More important, it is clear that the comment in question was mere *obiter dictum* and played a miniscule, if any, part in the Court's decision. Rule 19 of the Supreme Court Rules states that a writ of certiorari "will be granted only where there are special and important reasons therefor." Petitioners' third point in their brief is trivial at best and does not merit review under the strict standard of Rule 19.

CONCLUSION

For the foregoing reasons, petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

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(713) 224-7070

Attorneys for Respondent

AFFIDAVIT OF SERVICE

STATE OF TEXAS)
COUNTY OF HARRIS)

Before me, the undersigned authority, this day personally appeared Daniel K. Hedges, who being duly sworn, deposes and says:

1. I am over twenty-one years of age, and am qualified to make this affidavit. I am counsel of record for J. W. Gamble, respondent in this matter.

2. On the 16th day of January, 1976, three copies of the foregoing instrument were served on attorneys for petitioners by placing same in the United States mail, first class, certified, and postage prepaid, addressed to: Mr. Bert W. Pluymen, Assistant Attorney General, P. O. Box 12548, Austin, Texas 78711.

Daniel K. Hedges
Daniel K. Hedges

SWORN TO AND SUBSCRIBED BEFORE ME this 16th day of January, 1976.

Jo Barfield
Notary Public in and for
Harris County, Texas

JO BARFIELD
Notary Public in and for Harris County, Texas
My Commission Expires June 1, 1977

Supreme Court, U. S.
FILED
APR 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-929

* * *

W. J. ESTELLE, JR., RALPH GRAY AND H. H. HUSBANDS,

Petitioners

V.

J. W. GAMBLE,

Respondent

* * *

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

* * *

BRIEF FOR PETITIONERS

* * *

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W. J. ESTELLE, JR., RALPH GRAY,
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J. W. GAMBLE,

Respondent

* * *

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

* * *

BRIEF FOR PETITIONERS

* * *

OPINION BELOW

The opinion of the Court of Appeals, *Gamble v. Estelle*, 516 F.2d 937 (5th Cir. 1975), appears in the Appendix at 24-32. The order and judgment entered by the District Court for the Southern District of Texas, Houston Division, dismissing Respondent's complaint for failure to state a claim upon which relief could be granted, appear in the Appendix at 16-21. The order of that District Court denying Respondent permission to appeal under 28 U.S.C. § 1915 due to want of merit and good faith appears in the Appendix at 22-23.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 4, 1975. A timely petition for rehearing and suggested rehearing en banc was denied on October 2, 1975. Apendix at 33. The petition for writ of certiorari was was filed on December 31, 1975, and granted on February 23, 1976. The Honorable Michael Rodak, Jr., Clerk of this Court, extended the time within which to file the Brief for Petitioners until April 28, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

1. Whether an inmate's *pro se* complaint which states that his injury has been diagnosed and treated by two licensed physicians raises a constitutional question or states a claim under 42 U.S.C. § 1983 upon which relief can be granted.

2. Whether the court of appeals erred in reversing the district court's summary dismissal of a complaint where both the judgment of the court of appeals and the complaint of the inmate rest upon a disagreement with

licensed physicians as to diagnosis and treatment of the inmate's injury.

3. Whether the court of appeals erred in drawing inferences from irrelevant hearsay evidence presented at the appellate level by means of an appendix to complainant's brief.

STATEMENT OF THE CASE

Respondent, an inmate in the Texas Department of Corrections (T.D.C.), filed the *pro se* complaint contained in the Appendix at 3-15 (A.3-15) under 42 U.S.C. § 1983 against Petitioners W. J. Estelle, Jr., Director of T.D.C., Ralph Gray, Medical Director of T.D.C. and chief medical officer of the prison hospital, and H. H. Husbands, Warden of the Walls Unit.

The United States District Court for the Southern District of Texas, Houston Division, summarily dismissed the complaint for failure to state a claim upon which relief could be granted. (A.16-21).

Subsequently, the District Court denied Respondent's motion to vacate judgment and further denied him permission to appeal under 28 U.S.C. § 1915 due to want of merit and good faith. (A.22-23).

The United States Court of Appeals for the Fifth Circuit granted Respondent's application for leave to appeal in forma pauperis and appointed Mr. Daniel K. Hedges of Fulbright & Jaworski, Houston, Texas, to represent him on appeal. That Court had jurisdiction under 28 U.S.C. § 1291. After the submission of briefs and oral argument, the Court of Appeals reversed and remanded the cause with instructions to re-instate the complaint, appoint counsel and permit appropriate amendment. *Gamble v. Estelle*, 516 F.2d 937 (5th Cir. 1975); (A.24-32).

Petitioners' timely application for rehearing and suggested rehearing *en banc* was denied on October 2, 1975. (A.33).

Since the decisions of the courts below, and the decision of this Court depend entirely upon the *facts* alleged by Respondent in his complaint, Petitioners find it necessary to set them out.

On *November 9, 1973*, Respondent, while unloading cotton bales from a truck and flipping them to a machine, sustained an injury to his lower back. A "6.00" (?) pound bale, which Respondent was flipping, started falling flat and fell on him while he was attempting to prevent it from falling. (A.4).

Respondent worked four more hours, at which time he became stiff and requested a pass to the hospital. There, he was checked by a medical assistant (Captin Blunt) for a hernia and was sent to his living quarters. Two hours later, Respondent returned to the hospital, was given two pain pills by an inmate nurse, and saw a *doctor*. (A.4).

The next day, *November 10, 1973*, Respondent was examined by *Dr. Astone* at the hospital who diagnosed his injury as a lower back sprain. *Dr. Astone* placed Respondent on cellpass-cellfeed for two days, which meant he could remain in his cell, and prescribed Zactirin and Robaxin. (A.5).

On *November 12, 1973*, Respondent again saw *Dr. Astone* at the hospital who continued the same medication and extended the cellpass-cellfeed. (A.5).

On *November 19, 1973*, Respondent again saw *Dr. Astone* who prescribed Robaxin and Febridyne for seven days and extended the cellpass-cellfeed. (A.5).

On *November 26, 1973*, Respondent again saw *Dr.*

Astone who prescribed Zactirin for five days and extended the cellpass-cellfeed for seven days. (A.5).

On *December 3, 1973*, Respondent again saw *Dr. Astone* who prescribed Febridyne for seven days but took him off the cellpass-cellfeed, which meant that he would do light work. The same day, Respondent went to Major Muddox's office and told him he was not going to work because of lower back pain, and Respondent was placed in administrative segregation. (A.6).

On *December 5, 1973*, Respondent was taken before the unit disciplinary committee. He told the committee that he was still hurting, that he had only been given pain pills, and that *Dr. Astone* had not even noticed his high blood pressure. The committee took no action against Respondent and sent him to see another *doctor*. (A.6).

The next day, *December 6, 1973*, Respondent saw *Dr. Gray*, the TDC Medical Director and chief medical officer of the prison hospital, at the hospital who administered urinalysis, blood analysis, and high blood pressure tests. *Dr. Gray's* diagnosis of his back injury was that he had incurred a lower back sprain. Respondent's blood pressure was found to be 168/112. *Dr. Gray* prescribed Serapes and Febridyne. (A.6-7).

On *December 13, 1973*, Respondent saw *Dr. Gray* for back pain and high blood pressure. The blood pressure reading was found to be 152/98 and *Dr. Gray* prescribed Serapes for thirty days. (A.7).

On *December 17, 1973*, Respondent saw medical assistant Blunt at the hospital for back pain and received a prescription of Tiognolos for seven days. (A.7).

On *December 27, 1973*, Respondent again saw medical assistant Blunt who continued the Tiognolos

prescription for seven days.

On *January 3, 1974*, Captain Linsley asked Respondent if he wanted to go to work. He replied that he was not going to work hurting, and Captain Linsley stated that he would send him to the farm. (A.8).

On *January 5, 1974*, Lieutenant Ramsey asked the same question, received the same reply, and made the same statement. (A.8).

On *January 7, 1974*, Respondent went to the hospital for lower back pain, high blood pressure, and migraine headaches. Medical assistant Blunt prescribed Sodium Solicylate for seven days and Serapes for thirty days. (A.8).

On *January 17, 1974*, Respondent went to the hospital for lower back pain and stomach pain. Medical assistant Blunt prescribed Sodium Solicylate for seven days. (A.9).

On *January 25, 1974*, Respondent went to the hospital for lower back pain. Medical assistant Blunt prescribed Sodium Solicylate for thirty days. (A.9).

On *January 31, 1974*, Respondent was brought before the unit disciplinary committee pursuant to his refusal to go to work on *January 5*. He told the committee that he was not going to work with his lower back pain and high blood pressure. Medical assistant Blunt told the committee that Respondent's health classification was first class. The committee's ruling was adverse to Respondent, and he was placed in solitary confinement for refusing to work. (A. 9-10).

On *February 4, 1974*, Respondent complained of chest pain and black outs in the morning and was admitted to the hospital that evening. (A.10).

On *February 5, 1974*, *Dr. Heaton* interpreted an electrocardiagram administered to Respondent as follows: multiple unifocal P.V.C., S (re-entry often), inverted T wave, A.V.R. - lead 3 (normal), elevated P wave. (A.10).

On *February 6, 1974*, Respondent was transferred to administrative segregation and was placed on Quinidine pills by *Dr. Heaton* for three days. (A.10). Respondent was still having chest pain when he was discharged from the hospital.

On *February 8, 1974*, Respondent asked Officer Spencer to go on sick call for lower back pain, chest pain and black outs when he stood up. Officer Spencer went to check and on his return told Respondent they did not want him to go on sick call. (A.11).

On *February 9, 1974*, Respondent again complained of chest pain and saw *Dr. Heaton* at the hospital who continued the Quinidine prescription for another three days.

On *February 11, 1974*, Respondent signed the complaint, alleging the foregoing facts. (A.15).

SUMMARY OF ARGUMENT

The Respondent inmate filed a complaint under 42 U.S.C. § 1983 alleging that he had seen at least two doctors on eight separate occasions for a back injury. Both doctors had diagnosed the injury as a lower back sprain and had prescribed bed rest (cellpass-cellfeed), analgesics and/or muscle relaxants. The district court dismissed the complaint for failure to state a claim upon which relief could be granted. The United States Court of Appeals for the Fifth Circuit reversed and remanded the case with instructions to re-instate the complaint

and appoint counsel.

Though various catch-phrases have been employed by the courts to demark the point at which judicial deference to prison officials on matters of medical treatment must accede, the present case clearly falls outside the scope of the area in which judicial inquiry is constitutionally permissible. When the Respondent's *pro se* complaint is read with great liberality as to form, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and with special scrutiny as to the *facts* alleged, assuming them to be true, *Cooper v. Pate*, 378 U.S. 564 (1964), it is clear that Respondent's entire complaint rests on a difference of opinion with his physicians as to the diagnosis and treatment of his back injury. Of more alarming significance is that the opinion of the United States Court of Appeals for the Fifth Circuit is premised upon a similar difference of opinion between the honorable judges and the physicians, resulting in federal constitutional intervention. Eight other Courts of Appeals have held that such a disagreement does not raise a constitutional question or state a claim under 42 U.S.C. § 1983. To hold otherwise is to designate the federal district courts as medical review boards for physicians in correctional institutions.

A subsidiary point raised by Petitioners concerns the court below's reliance on a report dealing with the general delivery of medical services in the Texas prison system. Not only was the question of the adequacy of medical services in general neither presented to nor litigated in the district court, that question is totally irrelevant to the issue of whether the treatment afforded Respondent presented a reviewable constitutional claim.

ARGUMENT AND AUTHORITIES

I. The Decision Below, By Raising A Disagreement With Licensed Physicians As To Diagnosis And Treatment To A Constitutional Plane, Conflicts With The Decisions Of Eight Other Courts Of Appeals.

A. Eight courts of appeals have held that a disagreement with licensed physicians as to diagnosis and treatment does not raise a constitutional question or state a claim under 42 U.S.C. § 1983.

The leading case setting out the test applied to determine the sufficiency of a complaint is *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957):

> "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

It is fundamental that the primary element necessary to obtain relief under 42 U.S.C. § 1983 is a deprivation of a right secured by the "Constitution and laws" of the United States. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). In the area of medical care afforded inmates, the requisite constitutional infirmity for federal jurisdiction must be based on a transgression of either the eight amendment's prohibition against cruel and unusual punishment or the fourteenth amendment's protection of life. Thus, eight courts of appeals have held that a complaint alleging a *refusal* to provide medical care states a claim under § 1983, but that a claimed *inadequacy* of treatment does not, absent *exceptional* circumstances.

The United States Court of Appeals for the Ninth Circuit has followed the general rule that prison medical officials have broad discretionary authority in treating inmates. However, a complaint alleging a *failure or refusal* to provide medical care states a claim upon which relief can be granted and should not be dismissed. *Riley v. Rhay*, 407 F.2d 496 (9th Cir. 1969). To the contrary, a complaint alleging *inadequate* medical treatment should be dismissed unless *exceptional circumstances* exist which warrant judicial inquiry. See *Stiltner v. Rhay*, 371 F.2d 420 (9th Cir.), cert. denied, 387 U.S. 922 (1967). Where an inmate's allegations show only that he has not been receiving the kind and quality of medical treatment he believes is indicated, the complaint fails to state a claim upon which relief can be granted. *Id.* at 421 n.3.

The United States Court of Appeals for the Eighth Circuit also takes the position that a complaint alleging a *refusal* to provide medical treatment states a claim, but that a *claimed inadequacy* of treatment does not, absent exceptional circumstances. In *Freeman v. Lockhart*, 503 F.2d 1016 (8th Cir. 1974), the inmate alleged that the prison optometrist had suggested that surgery might correct the tuberculosis which had settled in his eyes and constituted a hazard to his vision; that he was subsequently denied access to a physician; and that consequently his vision was permanently impaired. The court found that the alleged refusal to provide treatment stated a claim upon which relief could be granted, but noted that:

> *"allegations of mere negligency in the treatment of a prisoner's condition or claims based on a difference of opinion over matters of medical judgment fail to state a federal constitutional question.* . . . [T]he claimed inadequacy of treatment must be predicated on *obvious neglect* or *intentional misconduct* by the prison officials (citations omitted), and must be so *heinous* as to constitute cruel and unusual punishment as that term is used in the Eighth Amendment or so endanger the prisoner's physical well-being that his Fourteenth Amendment right to life is violated." *Id.* at 1017. (Emphasis supplied).

The United States Court of Appeals for the First Circuit has used a "conduct which shocks the conscience" test when inadequacy in treatment is alleged rather than the "obvious neglect-intentional misconduct-heinous inadequacy" standard used by the Eighth Circuit. *Page v. Sharpe*, 487 F.2d 567 (1st Cir. 1973).

The United States Court of Appeals for the Second Circuit draws the same distinction between an alleged total denial of medical treatment and an alleged inadequacy of treatment -- the former states a claim while the latter does not. *E.g., Corby v. Conby*, 457 F.2d 251 (2d Cir. 1972); *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864 (2d Cir. 1970).

In *Coppinger v. Townsend*, 398 F.2d 392 (10th Cir. 1968), the United States Court of Appeals for the Tenth Circuit stated the distinction between the two claims:

> "A claim of total denial of medical care differs from a claim of inadequacy of medical care . . . . [I]n the instant case the allegations of the complaint show that medical care has been furnished. . . . The prisoner's right is to medical care-not to the type or scope of medical care which he personally desires. *A*

difference of opinion between a physician and a patient does not give rise to a constitutional right or sustain a claim under § 1983." Id. at 394.

The United States Court of Appeals for the Seventh Circuit has recently stated the inadequate medical treatment rule and its rationale as follows:

> "[A] claim is not stated where (an inmate) alleges no more than that he is dissatisfied as to the adequacy of treatment actually received for a particular injury or ailment. (Citations omitted). *Courts will not attempt to second-guess licensed physicians as to the propriety of a particular course of medical treatment for a given prisoner-patient." Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974).

The United States Court of Appeals for the Sixth Circuit has followed the established pattern in *Fitzke v. Shappell*, 468 F.2d 1072 (6th Cir. 1972) by holding that a complaint alleging a refusal to provide medical treatment states a claim and distinguishing the case where a prisoner is not "complaining about the refusal to provide medical care, but rather about the inadequacy of medical care . . . provided." *Id.* at 1076 n.4.

The United States Court of Appeals for the Third Circuit also takes the position that a complaint alleging improper or negligent medical treatment does not state a claim upon which relief can be granted. *United States ex rel. Johnson v. Prasse*, 450 F.2d 946 (3d Cir. 1971); *Gittlemacker v. Prasse*, 428 F.2d 1 (3rd Cir. 1970); *Pennsylvania ex rel. Gatewood v. Hendrick*, 368 F.2d 179 (3rd Cir. 1966), cert.denied, 386 U.S. 925 (1967).

Thus, eight courts of appeals have held that a complaint alleging a refusal to provide medical care states a claim under § 1983, but that a claimed inadequacy of treatment does not, absent exceptional circumstances. A disagreement with licensed

physicians as to diagnosis and treatment fails to state a federal constitutional question.[1]

B. The Respondent's complaint and the decision below consist of a simple disagreement with licensed physicians as to diagnosis and treatment.

Though various catch-phrases have been employed by the courts to demark the point at which judicial deference to prison officials on matters of medical treatment must accede, the present case clearly falls outside the scope of the area in which judicial inquiry is warranted.[2] When the Respondent's *pro se* complaint is read with great liberality as to form, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and with special scrutiny as to the *facts* alleged, assuming them to be true, *Cooper v. Pate*, 378 U.S. 564 (1964), it is clear that Respondent's

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[1]This Court's decision in *Haines v. Kerner*, 404 U.S. 519 (1972) has not detracted from the principles established by the foregoing cases, which were decided both before and after it was rendered. The complaint in *Haines* alleged that the prisoner suffered an aggravation of an existing foot injury and a circulatory ailment by being forced to sleep on blankets on the floor of his solitary confinement cell. The complaint contained no recital of any attempt to treat the inmate's injuries. Also alleged was a denial of due process in steps leading to his confinement in solitary. Noting the liberality with which *pro se* complaints are read, this Court held that a claim had been stated. This holding is consistent with the prevailing rule delineated above that a complaint alleging a total failure to provide medical treatment states a claim upon which relief can be granted.

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[2]At the outset, it must be realized that Respondent is not challenging the treatment administered for his heart and blood pressure. (See Response to Petition for Writ of Certiorari at 4). The only dispute in this case concerns Respondent's back injury and Petitioners will focus their attention on that.

entire complaint rests on a difference of opinion with his physicians as to the diagnosis and treatment of his back injury. Of more alarming significance is that the opinion of the court below is premised upon a similar difference of opinion between the honorable judges and the physicians, resulting in federal constitutional intervention.

This is obviously not a case where the inmate has alleged a *refusal* to provide medical treatment for his back, though the liberality of reading a *pro se* complaint is stretched to its apogee. The Respondent himself stated that he saw Dr. Astone five times (A.5-6), Dr. Gray two times (A.6-7), and medical assistant Blunt six times (A.4,7,8,9). In addition, Respondent saw an unidentified doctor on the very day he was injured. (A.4).

Contrary to the assertion of the court below that "the State . . . failed to diagnose Gamble's lower back injury," *Gamble v. Estelle*, 516 F.2d 937, 941 (5th Cir. 1975), both Dr. Astone and Dr. Gray, the T.D.C. Medical Director and chief medical officer of the prison hospital, diagnosed Respondent's back injury as a lower back sprain. (A.5-6).[3]

At most, the Respondent's complaint alleges that the medical treatment received for the back injury was *inadequate*. However, Respondent argued before the court below that the treatment afforded was in reality no treatment at all in an attempt to fall within the rule that a complaint alleging a total failure to provide medical treatment states a claim upon which relief can be granted. (Appellant's Fifth Circuit Brief at 7, 11-12). Indeed, that court adopted Respondent's assertion by

[3]Dr. Gray did so after administering urinalysis and blood analysis tests, which are useful in eliminating the possibility that the back pain was caused by a systemic (organic) disease. KRAUS, CLINICAL TREATMENT OF BACK AND NECK PAIN 29 (1970).

stating that "the only medication prescribed was to relieve the pain, not to cure the injury." *Gamble v. Estelle, supra* at 941. Respondent's argument and the court's conclusion rest entirely on a difference of opinion with the doctors as to the propriety of the course of medical treatment undertaken. The doctors variously prescribed bed rest (cellpass-cellfeed), analgesics and/or muscle relaxants for the back sprain. Contrary to the assertions of the nonphysicians, each of these plays a definite role in the *treatment* of lower back dysfunction. FINNESON, LOW BACK PAIN 95, 108, 111 (1973).

Attempting to fall within the rule that a complaint challenging the adequacy of treatment provided should not be dismissed if "exceptional circumstances" exist, Respondent argued below that the persistence of the pain indicated that his injury was a potentially serious lower back sprain. (Appellant's Fifth Circuit Brief at 11-12). Notwithstanding the inescapable conclusion that this argument is nothing more than an attempt to second-guess the diagnosis of licensed physicians, the court below reached a similar medical judgment:

> "[T]he exact nature of the back injury remains unknown. Certainly the pain pills had no curative effect, even though they were administered for some 3 months." *Gamble v. Estelle, supra* at 941.

Contrary to Respondent's argument and the court's conclusion, the persistence of the pain was not an indication that the Respondent's injury was not a simple muscle sprain for "[t]here is no relationship *whatsoever* between the severity of the injury and the *intensity* or *duration* of the symptoms. FINNESON, LOW BACK PAIN, *supra* at 90 (emphasis supplied). Moreover, the continuing pain could well have been caused by Respondent's refusal to discontinue his prolonged

bedrest as ordered by Dr. Astone.[4] FRIEDMANN & GALTON, FREEDOM FROM BACKACHES 100 (1973); KRAUS, CLINICAL TREATMENT OF BACK AND NECK PAIN, *supra* at 24. Finally, every medical book consulted emphasizes that pain, in varying degrees, has both an organic and a psychological cause, though the patient may not even be cognizant of the latter. The *unconscious* prolongation of symptoms in the face of secondary gain (such as the ability to refrain from working) is a fact acknowledged by all physicians. Pain is "an almost entirely subjective phenomenon. It is especially difficult to differentiate organic factors from psychic. . . . It is in this area that the 'art' of the physician is most severely challenged and is almost impossible to subject to quantitative evaluation and

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[4]Though the treatment of Respondent's physical problems other than his back injury is not at issue in this appeal, these problems are a sad commentary on the circumstances of this case. Respondent was placed on cellpass-cellfeed for 24 days after he injured his back. Presumably, he spent much of that time lying on his bed since there is little else to do in a prison cell. Dr. Astone's refusal to continue the cellpass-cellfeed meant the Respondent would do light work. Respondent refused to do so because of the continuing back pain and remained in his cell. This may have been logical to a layperson but not to a doctor:

> "For patients engaged in physical labor, the time to *resumework is not when they no longer experience pain, nor when they have normal muscle tests. Such patients require a slow and gradual retraining period to regain their lost lifting, carrying and pulling abilities."* KRAUS, *supra* at 122. (Emphasis in original).

As noted above, weakness of posture muscles due to prolonged bedrest may be the cause of continuing back pain. *Id.* at 24;FRIEDMANN & GALTON, *supra* at 100. Subsequently, Respondent complained of high blood pressure, chest pain, migraine headaches, stomach pain and black outs when he stood up. His blood pressure was indeed above normal and an electrocardiogram showed an inverted T wave and an elevated P

criticism. FINNESON, *supra* at 84.[5]

The court below further suggested that x-rays and other tests should have been conducted " that would other tests should have been conducted "that would have led to *appropriate* diagnosis and treatment." *Gamble v. Estelle*, *supra* at 941 (emphasis supplied). First, a comprehensive examination of low back pain consists of a series of simple physical movements and should take no more than fifteen minutes. FINNESON, *supra* at 41-48. Second, Petitioners could discuss the relative attributes in terms of utility, risks etc. of various tests including x-rays, electromyograms, myelographies,

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Footnote 4 cont.

wave. It is unfortunate that Respondent may have been the direct cause of his own problems by refusing to leave his cell. Prolonged bedrest causes "certain circulatory changes which may give rise to light-headedness and in some cases syncope once the erect position is resumed." FINNESON, *supra* at 96. Moreover, "[i]f the patient is under chronic stress, as most chronic . . . back pain patients are, the effect of the stress may help produce cardiovascular, gastrointestinal, or other diseases." KRAUS, *supra* at 29. That Respondent was under stress is not to be doubted since he alleged that the "wrongs" committed caused him to suffer mental anguish. (A.12). As to the cardiovascular effects of stress, Respondent's inversions of the T waves have generally been found in anxious patients. HURST & LOGUE, THE HEART 1471 (2d ed. 1970), though some normal persons are found to have them. LITTMAN, TEXTBOOK OF ELECTROCARDIOGRAPHY 74 (1972). Moreover, Respondent's elevated P waves may be caused by hypertension. WHITE, HEART DISEASE 209 (1951).

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[5]It is worth noting that in the overwhelming majority of cases, back pain has nothing to do with serious organic problems. FRIEDMAN & GALTON, *supra* at 11. The most important principle in the treatment of low back dysfunction is the avoidance of overtreatment. FINNESON, *supra* at 85-86.

discographies, and analysis of spinal protein fluid, but such a discussion would serve no useful purpose except to further emphasize the Respondent's and the court below's disagreement with the physicians' diagnosis of a lower back sprain.

II. The Decision Below Designates The Federal District Courts As Medical Review Boards For Physicians In Correctional Institutions.

If a complaint which stipulates that the inmate has seen several different doctors on numerous occasions and that these doctors have diagnosed his injury and prescribed treatment does not warrant summary dismissal, no complaint will. If the district court could not dismiss under the facts alleged in the Respondent's complaint, every future treatment may be challenged.

The court below prescribed the appropriate medical course of action to be x-rays and other tests of Respondent. The basis for such a judicial medical prescription can be none other than a simple disagreement with the diagnoses of the doctors. Quite simply, this means that if an inmate were examined by a dozen different doctors, each of whom diagnosed an injury as a lower back sprain, a district court could not dismiss the case for failure to state a claim because the doctors believed x-rays and other further tests to be unnecessary for their diagnoses. In sum, instead of allowing experienced and trained physicians to decide which inmates genuinely need to be x-rayed and tested further, the court below has removed that medical judgment from the hands of the doctors and placed it in the courts.

Thus, if an inmate hereafter complains that the doctors have not cured his ailment, the federal district

courts must intervene and review the physicians' diagnoses and treatment.[6] As a result, "the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous complaints." *Procunier v. Martinez*, 416 U.S. 396, 405 n.9 (1974).

III. The Court Below Impermissibly Drew Significant Inferences From Irrelevant Hearsay Evidence Presented At The Appellate Level.

On the basis of the Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, a portion of which was reproduced in the Appendix to Respondent's brief below, the court below found that, "the general medical services afforded by the State [of Texas] in its prisons are publicly known to be 'woefully inadequate.'" *Gamble v. Estelle, supra* at 940 and n.1.

The issue of the adequacy of general medical services afforded by the T.D.C. is presently being actively litigated in numerous major lawsuits, *e.g., Ruiz v. Estelle*, Civil Action No. TY-5523 (E.D. Tex., filed Aug. 17, 1972). Yet, the court below gave credence to the foregoing Report and its conclusion by drawing therefrom inferences adverse to the Petitioners, even though the question of the adequacy of medical services *in general* was neither presented to nor litigated in the district court. Most significantly, that question is *totally irrelevant* to the issue of whether the treatment afforded *this Respondent* presented a reviewable constitutional

---

[6]If this be a constitutional right, the courts should also recognize it for indigents outside of prison who cannot even afford to see two doctors on numerous occasions for a back injury.

claim. When the Respondent saw at least two doctors, including the T.D.C. Medical Director and chief medical officer of the prison hospital, on eight different occasions, it is inconceivable how an alleged general shortage of doctors is relevant to Respondent's case.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circut should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe B. Dibrell, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Brief for Petitioners have been served by placing same in the United States Mail, First Class, Certified, and Postage Prepaid, on this the 27th day of April, 1976, addressed to: Mr. Daniel K. Hedges, Attorney for Respondent, 800 Bank of the Southwest Building, Houston, Texas 77002.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-929

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

J. W. GAMBLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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OCTOBER TERM, 1975

No. 75-929

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

J. W. GAMBLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Whether a *pro se* petition by an illiterate prisoner alleging a violation of 42 U.S.C. §1983 must be read with great liberality as to form, must be assumed as true, and must be read with special scrutiny as to facts.

2. Whether it is error for a magistrate and district court to apply the prison deference rule to a suit charging violations of constitutional rights.

3. Whether allegations of deliberate indifference to the medical needs of a prisoner constitute a cause of action under 42 U.S.C. §1983.

4. Whether allegations of refusal to diagnose or treat the medical problem of a prisoner constitute a cause of action under 42 U.S.C. §1983.

5. Whether Gamble's complaint alleges either deliberate indifference to his medical needs or a refusal to provide him with diagnosis and treatment for his medical problem.

6. Whether the "exceptional circumstances" test proposed by petitioners would negate the injunctive relief available under 42 U.S.C. §1983.

7. Whether a federal court can rely on a "flood of litigation" argument when the claim is made that a protected constitutional right has been seriously infringed.

8. Whether the penal and judicial systems can turn their backs on cases such as Gamble's because there are simply too many of them, or whether the states must take steps to remedy the problem by improving prison medical care and by providing screening processes for such cases before they reach the courts.

9. Whether *obiter dictum* not bearing on any ultimate issue can constitute reversible error.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is inaccurate and incomplete in several respects. First, it is absolutely critical that this Court keep in mind that no answer was filed by the defendants in the trial court, absolutely no

discovery or evidentiary hearing has taken place, and there was not even a FED. R. CIV. P. 12(b) motion or hearing. Much of petitioners' brief gives the impression that there are some facts known in this case beyond those contained in Gamble's complaint. Such an impression is false.

Second, respondent Gamble totally disagrees with the remark on page 4 of petitioners' brief that the decision below and the decision of this Court "depend entirely upon the *facts* alleged by Respondent in his complaint. . . ." The decision of the Fifth Circuit turned on the failure of the district court to require an answer and at least enough discovery to provide the facts necessary to determine whether Gamble has stated an actionable claim under 42 U.S.C. §1983.

Third, the facts set forth in petitioners' Statement of the Case are inaccurate or incomplete on the following points:

November 10, 1973. Petitioners' assertion that Dr. Astone diagnosed Gamble's injury as a lower back sprain is not supported by the record. Gamble's complaint states: "Dr. Astone's medical record show that plaintiff receive a *lower back strain.*" (A-5). The complaint does *not* say *who* made this diagnosis. It could easily have been the medical assistant who saw Gamble the day before, or perhaps the inmate nurse who gave Gamble the pain pills.

Even more important than the silence as to who made the diagnosis, is the complete silence throughout the complaint as to on what the diagnosis is based. Nowhere in the complaint is it stated that *any* diagnostic tests were ever performed relating to the back injury. In their brief before this Court, petitioners

stress that "a comprehensive examination of low back pain consists of a series of simple physical movements and should take no more than fifteen minutes." (Petitioners' brief, p. 17). There is nothing in Gamble's complaint to indicate that such an examination ever took place, and it cannot simply be assumed that there was such an examination. Under the allegations of this complaint, it is possible that Gamble could prove that no diagnostic tests whatsoever took place.

November 12, 1973. Petitioners neglect in their Statement of the Case to point out that on this date Dr. Astone ordered that Gamble be placed on a lower bunk for one week. The Building Department refused to issue Gamble a lower bunk and he had to remain on a top bunk. (A-5).

December 3, 1973. Although Gamble told Dr. Astone that his back was as painful as the day of the injury, Astone took him off of cell pass-cell feed, which meant that Gamble would have to return to work. Despite Gamble's statement that approximately three weeks of pain pills and bed rest had done nothing to alleviate his injury, he was ordered back to work without any diagnostic tests. When Gamble complained of his pain to Major Muddox, he was placed in administrative segregation. (A-6).

December 6, 1973. After telling the unit disciplinary committee that he had high blood pressure as well as a back injury, Gamble was sent to see Dr. Gray. Gray performed a urinalysis, blood analysis, and high blood pressure test. (A-6, 7). There is absolutely nothing in the record to indicate that these tests had anything whatsoever to do with the back injury.

Furthermore, as was the case with Dr. Astone, there is nothing in the record to support petitioners' assertion

that Dr. Gray diagnosed Gamble's injury as a lower back sprain. (Petitioners' brief, p. 5). The complaint states: "Doctor Gray medical record show the plaintiff receive a lower back strain." (A-6). Two doctors in the same hospital would not keep separate records on the same patient. Hence, the record which Gamble refers to as Dr. Gray's record is undoubtedly the same as what Gamble earlier in his complaint referred to as Dr. Astone's record. In fact, the record is simply J.W. Gamble's record, and although it apparently indicated that he had a lower back strain, it is impossible to determine who made that entry. Once again, there is nothing to indicate that Dr. Gray conducted any tests to diagnose the back injury, and there is no indication that Gray entered a diagnosis in the records.

January 3-5, 1974. Although he was receiving medication for back pain and heart trouble, Gamble was told to return to work and that he would be sent to the farm if he refused. (A-8).

January 7, 1974. Petitioners completely neglect to inform the Court that at 8:00 a.m. on this date, Gamble requested to go on sick call because of back pain and migraine headaches. At noon, Officer Powell returned and told Gamble that he couldn't go. At 3:00 p.m. that day Gamble was allowed to go to the hospital but did not see a doctor. (A-8).

January 31, 1974. On January 7, 1974, Captain Blunt prescribed Ser-Ap-Es for Gamble for 30 days. (A-8). This drug is a treatment for hypertension. PHYSICIANS' DESK REFERENCE 694-696 (28th ed. 1974). On January 25, 1974, Captain Blunt prescribed sodium salicylate for Gamble for 30 days. (A-9). This drug is an analgesic or pain reliever. DORLAND,

ILLUSTRATED MEDICAL DICTIONARY 1400 (24th ed. 1965). However, on January 31, 1974, while these prescriptions for hypertension and low back pain were still in effect, the very man who issued the prescriptions testified that Gamble was in first class medical condition. (A-10). First class is the "most fit" classification of the five medical categories used by the Texas Department of Corrections. *Report of The Citizens' Advisory Committee to The Joint Committee on Prison Reform of The Texas Legislature,* November 1974 (see page A-8 of plaintiff-appellant's Fifth Circuit Brief).

Petitioners' Statement of the Case also neglected to point out that there is no indication that any doctor testified before the disciplinary committee and that no doctor, doctor's aid, or other medical personnel examined Gamble before he was placed in solitary confinement. (A-9, 10).

February 4, 1974. Petitioners overlook the fact that Gamble asked to see a doctor at 8:00 a.m. His request was not acted upon until 7:30 p.m., at which time a medical personnel examined Gamble. By then, the condition of Gamble's chest pain and high blood pressure was such that he was admitted to the unit hospital. (A-10).

February 7-8, 1974. As correctly noted by petitioners, Gamble asked to go on sick call both days because of pain in his lower back, chest, and left arm. The guards refused to allow him to go to sick call. (A-11).

SUMMARY OF ARGUMENT

The Fifth Circuit found that Gamble's complaint alleged actions which were tantamount to a ***refusal*** of medical care. Thus, the holding does not conflict with holdings of other circuits, all of which agree that a refusal of medical care violates a prisoner's Eighth Amendment guarantee against cruel and unusual punishment. This case involves far more than a mere disagreement as to diagnosis.

The emerging test on this issue is whether a complaint alleges *deliberate indifference* to the medical needs of a prisoner. Gamble's complaint does not indicate that any diagnostic tests were ever conducted to determine the nature and extent of his back injury; does not indicate whether any *doctor* ever made a diagnosis; does indicate that the pain persisted; does indicate that despite the persistence of the pain over a period of months, nothing was done other than prescribe pain pills, muscle relaxers, and bed rest. The complaint also lists a series of acts–refusals to allow Gamble to go to sick call, placing him in solitary confinement because he was too badly injured to work, threatening to send him to the farm if he did not return to work–which, *completely aside from diagnosis and treatment,* constitute deliberate indifference toward Gamble's medical needs.

Petitioners' "flood of litigation" arguments are improper in a case such as this one where a denial of a substantial constitutional right has been alleged. Furthermore, there will be no flood of cases such as Gamble's from Texas in the future because an administrative review procedure has recently been

established there which will insure that all future cases such as Gamble's will reach the district court with a well developed fact record. Gamble only asks that he be allowed to attempt to develop such a record in support of his complaint.

The Fifth Circuit and this Court are free to take judicial notice of public documents which describe the woefully inadequate condition of medical care in the Texas prison system. In any event, the Fifth Circuit's decision was in no way based on the overall condition of medical care in the system and petitioners have not even alleged that their substantial rights have been prejudiced by the Fifth Circuit's consideration of the document in question.

I.

THE DECISION BELOW DOES NOT DISAGREE WITH LICENSED PHYSICIANS AS TO DIAGNOSIS, AND, THEREFORE, DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER COURTS OF APPEALS.

During his tenure on the United States Court of Appeals for the Eighth Circuit, Justice Blackmun wrote that "a prisoner of the state does not lose all his civil rights during and because of his incarceration." One civil right which a prisoner retains is the Eighth Amendment's guarantee against the infliction of cruel and unusual punishment. *Jackson v. Bishop,* 404 F.2d 571, 576 (8th Cir. 1968). Respondent J.W. Gamble, an inmate in the Texas Department of Corrections (T.D.C.), has alleged a denial of medical care so severe

that it constitutes cruel and unusual punishment. The magistrate and the district court applied an outmoded and discredited test of sufficiency to Gamble's complaint. When said complaint is read in the manner dictated by law and the proper test of sufficiency is applied, there can be no doubt that Gamble's complaint has stated a cause of action under 42 U.S.C. §1983.

A. Gamble's complaint alleges a failure to diagnose and treat, not a simple disagreement as to the result of a diagnosis.

1. The magistrate and the district court erred in applying the discredited prison deference rule to a suit charging violations of constitutional rights.

At the very outset, it is critical for this Court to note that whatever standard petitioners or respondent urge upon the Court as the proper standard for reviewing complaints such as Gamble's there is *no dispute* that the standard applied by the magistrate and the district court was wrong.

The magistrate based his recommendation of dismissal on the language in *Lawrence v. Wainwright,* 440 F.2d 379, 380 (5th Cir. 1971), that "in order to state a claim [under 1983] . . . , the complaint must allege an abuse of discretion by prison authorities in providing medical treatment for prisoners." (A-18). The present case was an improper one for the application of this "prison deference rule" or "hands off doctrine."
TPO, Inc. v. McMillen, 460 F.2d 348, 359 (7th Cir. 1972). See also *La Buy v. Howes Leather Co.,* 352 U.S. 249, 256 (1957). The record indicates that the district

court did abdicate its responsibility to decide the case. In short, there is no doubt that the wrong standard was applied in reviewing Gamble's complaint, and the record indicates that the magistrate's recommendation—based on this improper standard—was accepted by the district judge without any independent review.

2. Deliberate indifference to the medical needs of a prisoner constitutes a violation of 42 U.S.C. §1983.

Petitioners have argued that a claim is stated under 42 U.S.C. §1983 for inadequate medical care only when a complaint alleges a refusal of care or inadequate care coupled with exceptional circumstances. Although Gamble's petition does state a cause of action even under this stringent standard, respondent would urge the Court to find that deliberate indifference to the medical needs of a prisoner constitutes a violation of 42 U.S.C. §1983.

The principle that a prisoner does not lose all of his civil rights because of his incarceration is well established. One right which he retains is the right to be free from cruel and unusual punishment. *Jackson v. Bishop,* 404 F.2d 571, 576 (8th Cir. 1968).

The magistrate and the district court erred in looking for allegations of abuse of discretion by prison officials when they should have been looking for allegations of violations of Gamble's constitutional rights. Prison officials have no discretion to violate the United States Constitution, particularly when the violation bears no relation to discipline, security, or any other concomitant of proper prison administration. Denial of medical care is not such a concomitant.

Admittedly, allegations of mere negligence by prison medical personnel or disagreement as to diagnosis do not constitute actionable claims under the Civil Rights Act. *Gittlemacker v. Prasse,* 428 F.2d 1 (3d Cir. 1970); *Flint v. Wainwright,* 433 F.2d 961 (5th Cir. 1970). The allegations must be considerably more serious than that.

> Hence an action against prison officials for inadequate medical care may be brought under the Civil Rights Act in the federal district courts when the prisoners allegations rise to the level of cruel and unusual punishment in violation of the Eighth Amendment.

Martinez v. Mancusi, 443 F.2d 921, 923 (2d Cir. 1970). See also, *Gittlemacker v. Prasse, supra* at 6.

The question of what facts a complaint must allege to rise to the level of cruel and unusual punishment and thereby state a claim under the Civil Rights Act was examined thoroughly in *Campbell v. Beto,* 460 F.2d 765, 768 (5th Cir. 1972):

> The Fourth Circuit has spoken directly to the proper and improper uses of the doctrine.
>
> > The hands-off doctrine operates reasonably to the extent that it prevents judicial review of deprivations which are necessary or reasonable concomitants of imprisonment. Deprivations of reasonable medical care . . . are not among such concomitants, however.
>
> *Edwards v. Duncan,* 355 F.2d 993, 994 (4th Cir. 1966). In *Newman v. Alabama,* 503 F.2d 1320, 1329 (5th Cir. 1974), the Fifth Circuit agreed with the Fourth Circuit that:

. . . [T]his court has been cognizant of the fact that deference which shields officials engaging in intemperate action and which excuses judicial myopia is incompatible with our role as arbiters of the Constitution and hence cannot be countenanced. Thus, while obedient to our limited function in passing upon prison complaints, we have not been impervious to the need to fetter prison officials where constraints are constitutionally appropriate. For example, in Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968), we remonstrated that once an individual is incarcerated, "any further restraints or deprivations in excess of that inherent in the sentence and in the normal structure of prison life should be subject to judicial scrutiny." And we amplified these concerns in Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972), observing that:

> "Whatever may be the outer contours of the 'prison discipline rule', it is apparent that the courts cannot close their judicial eyes to prison conditions which present a grave and immediate threat to health or physical well being. . . . . If 'the deprivation of basic elements of hygiene' has consistently been held violative of constitutional guarantees . . . , then certainly practices of adequate medical treatment, particularly such deprivation as immediately threatens life and limb, would be equally vulnerable."

While deference to the actions of prison officials is appropriate in areas of legitimate prison administration, it is grossly inappropriate in a case such as the present one. Neither petitioners nor respondent argue that the prison deference rule is appropriate in this suit. Thus, whatever standard this Honorable Court chooses to articulate, it *must* keep in mind that the magistrate

used the *wrong* standard in reviewing Gamble's complaint.

It should also be noted that there is no indication in the record that the district court reviewed the record or did anything other than blindly accept the magistrate's recommendations (A-20, 21). The Seventh Circuit has noted that:

> . . . [T]here is to be "no abdication of the decision-making responsibility" of district courts . . . "the district judge is to retain the ultimate responsibility for the conduct of pretrial or discovery proceedings," and . . . §636(b) "cannot be read in derogation of the fundamental responsibility of judges to decide the cases before them."
>
> Whatever may be the outer contours of the "prison discipline rule", it is apparent that the courts cannot close their judicial eyes to prison conditions which present a grave and immediate threat to health or physical well being . . . . If "the deprivation of basic elements of hygiene" has consistently been held violative of constitutional guarantees. . . , then certainly practices which result in the deprivation of basic elements of adequate medical treatment, particularly such deprivation as immediately threatens life and limb, would be equally vulnerable.

Petitioners' brief (at pp. 10-12) incorrectly states that the Second and Eighth Circuits hold that to state a cause of action under 42 U.S.C. §1983 for inadequate medical care, a prisoner must allege a refusal of treatment. In fact, both of these circuits hold, and respondent urges this Court to hold, that:

> . . . "[A] charge of deliberate indifference by prison authorities to a prisoner's request for

essential medical treatment is sufficient to state a claim."

Wilbron v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975); see also *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974).

3. When being considered for summary dismissal, the allegations in a *pro se* petition alleging a violation of 42 U.S.C. §1983 must be read with great liberality as to form, must be assumed to be true, and must be read with special scrutiny as to facts.

In *Haines v. Kerner*, 404 U.S. 519, 520 (1972), this Court noted that it holds *pro se* complaints to a less stringent standard than formal pleadings drafted by lawyers. Several years before *Haines* the Fifth Circuit adopted a similar rule recognizing that prisoners handling their own cases are "unschooled in the intricacies of pleading and procedure." *Granville v. Hunt*, 411 F.2d 9, 10 (5th Cir. 1969).

It is clear from J.W. Gamble's petition that he is not only unschooled in the law but also unable to spell, punctuate, or construct a sentence. Admittedly this makes the petition difficult to read and interpret. However, such difficulty calls for even greater liberality and care in scrutinizing the petition than would be accorded a well-drafted pleading.

When ruling on a motion to dismiss a complaint under FED. R. CIV. P. 12(b), a court must accept the allegations of the complaint as true. *Cooper v. Pate*, 378 U.S. 546 (1964); *Campbell v. Beto*, 460 F.2d 765, 766 (5th Cir. 1972). Unquestionably the allegations must also be accepted as true when the trial court

considers dismissal on its own initiative before even receiving any motions from defendants. In view of the general condition of medical care in the Texas Department of Corrections, *infra*, there is every reason to believe that Gamble's allegations are in fact true.

Finally, appellate courts should scrutinize dismissal of civil rights actions with special care. *Lucarell v. McNair*, 453 F.2d 836, 838 (6th Cir. 1972). Similarly, before a magistrate recommends dismissal or a trial judge adopts such a recommendation each should carefully scrutinize the factual allegations of the *pro se* civil rights petition. After the petition has been read in accordance with these rules, it cannot be dismissed unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines v. Kerner*, 404 U.S. 520, 521 (1972).

In short when summary dismissal is contemplated, *pro se* civil rights petitioners should be read liberally as to form, scrutinized carefully as to facts, and all allegations must be accepted as true. Petitioners (appellees' Fifth Circuit brief, p. 7) and the Fifth Circuit [*Gamble v. Estelle*, 516 F.2d 937, 940 (5th Cir. 1975)] agree with this approach. If these rules had been followed in the present case, the action would not have been dismissed.

4. When Gamble's complaint is read with great liberality as to form, is assumed as true, and is read with special scrutiny as to facts, it states not only deliberate indifference to Gamble's medical needs, but also a complete refusal of both diagnosis and treatment.

Petitioners readily admit (petitioners' brief, p. 9) that allegations of a *refusal* of medical care constitute a cause of action under 42 U.S.C. §1983. Gamble's complaint alleges both a refusal of medical care and deliberate indifference to Gamble's medical needs.

Counsel for respondent sympathizes with the difficulties which the magistrate and the district court encountered in examining the petition. While some of these difficulties resulted from the mistaken use of the prison deference rule, others were undoubtedly caused by the form and language of the petition.

The magistrate stressed in his Memorandum and Recommendation that the prisoner detailed "a program of medical treatment, examinations by prison doctors, hospitalization and medical lay-ins he received on approximately 24 separate occasions between the date of the injury and extending into early this year." (A-18, 19). The "treatment" Gamble received amounts to no treatment at all.

> . . . [F]ailure to provide medical care, or treatment so cursory as to amount to no treatment at all, may, in the case of serious medical problems, violate the Fourteenth Amendment.

Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970).

J.W. Gamble received no proper diagnosis, was given nothing but pain pills for a potentially severe lower back injury, and was placed in solitary confinement

when he refused to return to work for the very good reason that he was still in pain from the back injury. If this course of neglect and abuse is held to be adequate medical treatment—or any medical treatment at all—the Texas Department of Corrections will be free to dispense pain pills to all ill and injured prisoners until they collapse. And even then the T.D.C. personnel would not be liable for damages to such prisoners.

As pointed out in the Statement of the Case at the beginning of this brief, there is no indication in the record of *who* diagnosed Gamble as having a lower back strain. It could have been a medical assistant or even an inmate nurse. More important, there is no evidence whatsoever in the record that any diagnostic tests were ever conducted.

However, even if there had been a diagnosis, when and injury is diagnosed and medication indicated by the diagnosis is administered, but the symptoms of the injury persist, the obvious conclusion is that the diagnosis was wrong. The prison personnel thought Gamble had merely strained his back, so they prescribed pain pills and rest. Days, weeks, and months passed and the pain from Gamble's lower back injury persisted. Yet, no further tests were administered.

Diagnostic techniques for lower back injuries are well established and range from simple physical movements to complex chemical tests. The physical movements include having the patient lie down and raise his legs, raise his legs while sitting, and flex and move his neck. If the results of these tests are ambiguous or subsequently prove incorrect other available methods include electromyogram, x-rays, myelography, discography, and analysis of spinal protein fluid.

Cailliet, *Diagnosis of Low Back Pain,* 4 LAWYER'S MED. J. 199 (1968).

There can be no excuse for the failure to at least x-ray Gamble's lower back when it became evident that the injury was more than a simple muscle strain. The Fifth Circuit has dealt recently with an almost identical situation in *Robinson v. Jordan,* 494 F.2d 793 (5th Cir. 1974). A prisoner awaiting trial complained of severe rectal pains. He saw a doctor twice, and the doctor diagnosed the problem as hemorrhoids. The prisoner was refused x-rays and other clinical tests. Several months later the condition was diagnosed as advanced rectal cancer and it was necessary to remove a portion of the prisoner's colon and to leave him with an open colostomy.

The prisoner filed a *pro se* 1983 money damages claim for inadequate medical care. The Fifth Circuit vacated and remanded the district court's dismissal, relying in part on *Haines v. Kerner, supra,* and *Campbell v. Beto, supra.* The Court described the refusal of x-rays and other clinical tests as follows:

> This complaint may not be viewed under a narrow negligence or medical malpractice concept. A constitutional violation is asserted, however inartfully, of denial of essential medical care. . . .

Id. at 794.

The *Robinson* holding mandates that the dismissal of Gamble's complaint be vacated and remanded. When Gamble's petition is given careful scrutiny it is immediately obvious that Gamble, like Robinson, was incorrectly diagnosed at first. The continuation of his back pain made it manifest that the first diagnosis was simply wrong. Faced with this error, Dr. Astone or one

of the other prison doctors should have conducted further tests, just as the doctor in *Robinson* should have done. The fact that Gamble did not demand further tests is irrelevant. Lay prisoners cannot be expected to conduct their own diagnoses.

The conditions of both Robinson and Gamble were diagnosed. However, both were diagnosed incorrectly. Neither was given x-rays or other available clinical tests. Such a *refusal* of diagnosis constitutes an actionable denial of essential medical care.

In his Memorandum and Recommendation the magistrate stressed that Gamble underwent a "program of medical treatment." He notes the number of times Gamble went to the hospital, saw prison doctors, and was given medical lay-ins. (A-18). To a certain extent, the magistrate is correct. Gamble did receive treatment for his blood pressure and heart problems. He did not receive treatment for his lower back injury.

Among the drugs administered for the heart difficulties were quinidine (R. 12) and Ser-Ap-Es (R. 9). The former is a isomer of quinine and is used to treat cardiac arrhythmias, or absence of rhythm. DORLAND, ILLUSTRATED MEDICAL DICTIONARY 1261 (24th ed. 1965). Ser-Ap-Es has been found by the F.D.A. to be an effective treatment for hypertension. PHYSICIANS' DESK REFERENCE 694-696 (28th ed. 1974). In short, administering quinidine and Ser-Ap-Es to one with heart and blood pressure problems *is* treatment.

The drugs prescribed for the back injury were febridyne (A-5), tiognolos (A-7), zactirin (A-5), robaxin (A-5), and sodium salicylate (A-8). Febridyne is a pain pill. Tiognolos is a muscle relaxant. (A-7). Zactirin is a

form of aspirin. MARTIN, HAZARDS OF MEDICATION 831 (1971). Robaxin is a muscle relaxant which the F.D.A. has found to be of doubtful effectiveness. PHYSICIANS' DESK REFERENCE 1206-1207 (28th ed. 1974). Sodium salicylate is an analgesic, or pain reliever. DORLAND, *supra* at 1400. Aspirin, muscle relaxants, and analgesics all perform only one function, they relieve pain.

In addition to the prescription of the pain pills, Gamble was also put on cellpass-cellfeed, which meant he was to remain in his cell at all times. (A-5). Pain pills and rest are a reasonable course of treatment for a muscle strain in the lower back. When Gamble's pain continued it became obvious that his injury was of a more severe nature. Pain pills are no treatment at all for a damaged disc or vertebrae.

In *Sawyer v. Sigler*, 320 F. Supp. 690 (D. Neb. 1970), a prisoner had swelling in lymph glands and throat and continuous pain on the left side of his jaw and throat among other symptoms. The prisoner requested laboratory tests and biopsies, but none were performed. *Id.* at 694. In granting the prisoner's request for an examination by a specialist in cancer, the court stated:

> The record is devoid of any indication that Bartholomew has received any medical treatment, except the administration of medication for pain. . . .
>
> * * *
>
> If the treatment or lack of treatment of a prisoner is such that it amounts to indifference or intentional mistreatment, it violates the prisoner's constitutional guarantees. When a state undertakes to imprison a person, thereby depriving him largely

> of his ability to seek and find medical treatment, it is incumbent upon the state to furnish at least a minimal amount of medical care for whatever conditions plague the prisoner.

Id. at 695, 696. Three months of pain pills where it is obvious that they are doing no good does not equal even a "minimal amount of medical care."

Short of corrective surgery, several simple treatments are available for lower back injury, such as dry or moist heat treatment, exercises, or corsets. OBER, BACKACHE 72-74 (1955). None of these was utilized. Because of the earlier discussed failure to diagnose, the exact nature of Gamble's lower back injury is still unknown. What *is* known is that pain pills have exerted no curative effect. Yet, for three months pain pills are all that Gamble has received. Such indifference and cursory treatment amounts to no treatment at all and states an actionable claim under the Civil Rights Act. *Tolbert v. Eyman, supra; Sawyer v. Sigler, supra.*

Petitioners have cited various medical authorities for the propositions that *some* back injuries can be diagnosed by simple physical examinations and that *some* back injuries can be successfully treated with pain pills and rest. If Gamble's complaint is properly read and assumed as true, there can be no doubt that pain pills and bed rest proved ineffective in treating his back injury. All of petitioners' theorizing (petitioners' brief, pp. 15-17) as to the causes of Gamble's pain is sheer speculation and should be completely ignored. The *only* way that it can be determined whether Gamble received a diagnosis or adequate treatment is by examining his medical records.

When Gamble's complaint is examined under the "deliberate indifference" test, it is readily apparent that the complaint states a cause of action. The following acts constitute "deliberate indifference":

1. On November 12, 1973, Dr. Astone ordered that Gamble be placed on a lower bunk for one week. The Building Department refused to issue Gamble a lower bunk and he remained on a top bunk. (A-5).
2. On December 13, 1973, Dr. Gray prescribed Ser-Ap-Es for Gamble's high blood pressure. The hospital staff lost the prescription and Gamble did not receive the medication until December 17 (A-7).
3. On January 3, 1974, Captain Linsley told Gamble that if he did not return to work he would be sent to the farm. At this time, Gamble was receiving prescribed medication for heart trouble and back pain. (A-8).
4. On January 5, 1974, Lieutenant Ramsey told Gamble that if he did not return to work he would be sent to the farm. At this time, Gamble was still receiving prescribed medication for heart trouble and back pain. (A-8).
5. On January 7, 1974, at 8:00 a.m., Gamble asked to go on sick call because of lower back pain and migraine headaches. He was told he could not go. At 3:00 p.m. he was allowed to go to the hospital. (A-8).
6. On January 31, 1974, Gamble was taken before the unit disciplinary committee because of his refusal to work. On this date, Gamble was still taking medication for his back pain and heart

trouble. Captain Blunt, who himself had prescribed the heart medication which Gamble was still taking, testified that Gamble was in first class condition. No doctor testified at the hearing. Gamble was sent to solitary confinement. No doctor examined him before he went into solitary. (A-9, 10).

7. On February 4, 1974, at 8:00 a.m., Gamble asked to see a doctor because of chest pains and black outs. The guard had to check with the warden since the warden's permission is required before an inmate in solitary can see a doctor. Finally, at 7:30 p.m. Gamble was examined, and his condition was such that he was put in the hospital. (A-10).
8. On February 7, 1974, at 8:00 a.m., Gamble asked to go on sick call because of pain in his back, chest, and left arm. The guards *refused* to let him go. (A-11).
9. On February 8, 1974, at 8:00 a.m., Gamble again asked to go on sick call, and again the guards *refused* to let him go. (A-11).

A study supported by the Law Enforcement Assistance Administration of the United States Department of Justice has condemned explicitly practices such as the above.

> . . . the right to medical care is *not* one of the rights of which [inmates] have been deprived by judicial sentence, and the only care available to them is the care provided by the correctional system.

* * *

> *The best defense against litigation is a system of health care which offers consistent service of good quality in adequate supply.*
>
> * * *
>
> It is essential that appearance at sick call be recognized as an inmate *right*, not a privilege. No member of the correctional staff, for example, should approve or disapprove requests for attendance at sick call. Denial of access to sick call is an open invitation to inmates to sue the institution–for it is *prima facie* evidence of denial of medical care.

E. BRECHER and R. DELLA PENNA, HEALTH CARE IN CORRECTIONAL INSTITUTIONS 2, 11 (1975). On January 7 and February 4, 1974, Gamble asked at 8:00 a.m. on both days to see a doctor. On January 7 he was not allowed to see a doctor until 3:00 p.m., and on February 4, it was not until 7:30 p.m. On February 7 and 8, 1974, the guards *refused* to allow Gamble to see a doctor. *Completely aside from questions of diagnosis and treatment*, these refusals to allow Gamble to see a doctor constitute a *prima facie* case of denial of medical care.

Bishop v. Stoneman, 508 F.2d 1224 (2d Cir. 1974), involved allegations very similar to Gamble's, although *Bishop* was a class action. One plaintiff waited ten days to see a doctor about an injured shoulder. One plaintiff who had lost 30 pounds in three weeks was given vitamin pills. A subsequent blood test revealed massive liver damage. A third person, who could not eat and was vomiting, was treated by a dispensary attendant. When he finally saw a doctor, the latter prescribed vitamins. Five days later the prisoner began turning yellow and was quarantined.

In granting the defendants' Rule 12(b) (6) motion, the district court judge examined each incident individually and determined no one of them constituted cruel and unusual punishment. In reversing and remanding, Judges Friendly, Feinberg, and Gurfein held:

> Taking the factual allegations as true, we think that they state a claim for relief under Section 1983. As Judge Coffrin recognized, deliberate indifference to the medical needs of a prisoner can amount to a Section 1983 violation. . . . A series of incidents closely related in time, within several months as these are, may disclose a pattern of conduct amounting to deliberate indifference to the medical needs of prisoners. We hold the cumulation of incidents alleged in the complaint entitled plaintiffs to a trial of the underlying allegation of deliberate indifference to their medical needs.

Bishop v. Stoneman, 508 F.2d 1224, 1225-26 (2d Cir. 1974). Similarly, the cumulation of the incidents set forth above which involved Gamble amounts to deliberate indifference to his medical needs.

In summary, the magistrate and the district court applied the *wrong* test–the discredited prison deference rule–to Gamble's complaint. The Fifth Circuit, reading the complaint with great liberality as to form, special scrutiny as to facts, and assuming it as true, found a *refusal* of diagnosis and treatment. If one applies the deliberate indifference test, it is clear that Gamble has listed a series of incidents which constitute a *prima facie* cause of action under 1983 *completely aside from* issues of diagnosis and treatment.

B. The decision below is not in conflict with the decisions of other courts of appeals.

1. The court below found that Gamble's complaint alleged a refusal of diagnosis and treatment.

In seeking to invoke the jurisdiction of this Court, petitioners have alleged that the Fifth Circuit's holding in this case is in conflict with holdings from the other circuits. This allegation is simply not true. The Fifth Circuit held:

> We find the complaint sufficient in alleging that the action of the authorities was *tantamount to a refusal of medical treatment* and remand the case for further action in light of this opinion. (Emphasis added.)

Gamble v. Estelle, 516 F.2d 937, 938 (5th Cir. 1975). Hence, the strictest test of all was used in this case.

Petitioners' detailed listing of holdings from other circuits is an exercise in futility. Respondent Gamble readily agrees with petitioners that a mere disagreement as to diagnosis does not state a claim. Respondent and petitioners also agree that allegations of refusal of medical care do state a claim. Gamble's complaint alleged such a refusal.

A brief review of some of petitioners' cases indicates that the proper test is the aforementioned deliberate indifference test and that courts should always at least examine the medical records in cases such as Gamble's. Petitioners cite *Corby v. Conby*, 457 F.2d 251 (2d Cir. 1972), and *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864 (2d Cir. 1970), for the proposition that in the Second Circuit an alleged denial of care states a claim

while alleged inadequacy of care does not. The more recent Second Circuit cases *Bishop v. Stoneman*, 508 F.2d 1224 (2d Cir. 1974), and *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974), both hold that a claim under 1983 is stated by allegations of deliberate indifference to the medical needs of prisoners. The older Second Circuit case *Blanks v. Cunningham*, 409 F.2d 220, 221 (2d Cir. 1969), makes the point that "the propriety of an evidential hearing . . . can be determined by examining the prisoner's allegations in the light of the prison's medical records." Respondent Gamble fully agrees. No court has yet examined his medical records.

Petitioners also place considerable emphasis on the Ninth Circuit cases *Riley v. Rhay*, 407 F.2d 496 (9th Cir. 1969), and *Stiltner v. Rhay*, 371 F.2d 420 (9th Cir.), cert. denied, 387 U.S. 922 (1967). Petitioners chose to ignore the more recent Ninth Circuit case of *Tolbert v. Eyman*, 434 F.2d 625 (9th Cir. 1970). The *Tolbert* holding is very applicable to the present case. The Ninth Circuit held:

> . . . failure or refusal to provide medical care, or *treatment so cursory as to amount to no treatment at all*, may, in the case of serious medical problems, violate the Fourteenth Amendment. (Emphasis added.)

434 F.2d at 626. Tolbert saw prison doctors who refused to believe that he had the eye condition of which he complained. Tolbert also received medication, but it was completely inadequate and his symptoms worsened. Such cursory treatment amounts to no treatment at all. Continued prescription of pain pills and bed rest over a period of months for a potentially serious back injury which does not respond also amounts to no treatment at all.

Petitioners also cite *Freeman v. Lockhart,* 503 F.2d 1016 (8th Cir. 1974), for the proposition that a claimed inadequacy of treatment does not state a cause of action absent exceptional circumstances. Once again, there is a more recent case directly in point. In *Wilbron v. Hutto,* 509 F.2d 621 (8th Cir. 1975), the Eighth Circuit adopted the deliberate indifference test. Also, in *Wilbron,* the Eighth Circuit commended the district court judge for securing the plaintiff's medical records from the prison, and examining them along with the complaint.

In summary, the Fifth Circuit's decision does not conflict with other circuits' holdings because the Fifth Circuit applied the strictest test of all. A review of the other circuits reveals a trend toward the deliberate indifference test and shows that other circuits wisely recommend that the district judge obtain the medical records to read with the complaint.

2. The "exceptional circumstances" test advocated by petitioners is not the test of eight other circuits, and is unacceptable because it would negate the injunctive relief available under 42 U.S.C. §1983 to prisoners receiving inadequate medical care.

As pointed out above, the Second and Eighth Circuits have explicitly adopted the deliberate indifference test. While the Fifth and Ninth Circuits have not articulated that test by that name, some holdings in those circuits in effect use the deliberate indifference test. Thus, petitioners' exceptional circumstances rule is not the rule in the majority of circuits, and it certainly

should not be because it would negate the injunctive relief available under 42 U.S.C. §1983.

42 U.S.C. §1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity, or other proper proceeding for redress.* (Emphasis added.)

Although Gamble's *pro se* petition does not specifically request equitable relief, he does seek "such other end [sic] further relief as this court may deem just, proper and equitable." (A-14). The required liberal reading of the petition makes it clear that a critical part of the relief which Gamble requests is the proper medical treatment of his still-painfull back condition. He is not bringing suit solely for money damages.

The relief sought by J. W. Gamble is similar to the relief obtained by one of the plaintiffs in *Sawyer v. Sigler,* 320 F. Supp. 690 (D. Neb. 1970). The order in that case read:

> An order will be entered directing the warden of the Nebraska Penal and Correctional Complex to provide for Bartholomew an examination by a specialist in cancer and allied diseases, whether within or without the Nebraska Penal and Correctional Complex, including such biopsies and other tests as such specialist deems advisable, all within 30 days of the date of the order, and thereafter to provide such treatment as such specialist in consultation with one or more

> physicians employed by the Nebraska Penal and Correctional Complex deem advisable, insofar as such treatment reasonably is available. The court will retain jurisdiction of the case for the purpose of being informed of the examination and treatment at periodic intervals.

Id. at 695.

This is one of the forms of relief which J. W. Gamble seeks. Under petitioners' "exceptional circumstances" test such relief will either be unavailable or will become available only after a prisoner has been crippled by his injury or illness.

Before the Fifth Circuit petitioners based their "exceptional circumstances" test largely on the holdings in *Hutchens v. Alabama*, 466 F.2d 507 (5th Cir. 1972), and *Robinson v. Jordan*, 494 F.2d 793 (5th Cir. 1974). In *Hutchens* there had been a medical determination that the plaintiff had terminal cancer of the palate and throat and that his life expectancy was less than two months. In *Robinson* the plaintiff had advanced rectal cancer and had to have a portion of his colon removed leaving him with an open colostomy. Presumably these grim facts are the "exceptional circumstances" of which petitioners speak.

To always require proof of similar harm from past inadequate care would make sense if the only relief afforded by 1983 was money damages. If that were the case, plaintiffs would have to prove such facts to establish injury entitling them to damages. However, as earlier discussed, 1983 is also designed to provide equitable relief from ongoing inadequate care.

Petitioners seem unaware of this purpose of 1983. They argue that before a prisoner is entitled to relief

under the Civil Rights Act he must come into court with an open colostomy or with terminal cancer resulting from inadequate past medical care. This argument not only ignores the equitable relief available under 1983 but also reflects a tragically inhumane attitude toward the physical well-being of the inmates of the Texas prison system.

J. W. Gamble does seek money damages for the pain and suffering which has been caused by inadequate past medical treatment. He will also seek an order from the district court directing the Department of Corrections to allow him to have a proper examination and to receive the treatment indicated by such examination. Respondent Gamble prays that this Honorable Court grant him at least the opportunity to present his request for relief to a jury and that it not condition that grant on his entering the courthouse permanently and seriously crippled.

II.

THE DECISION BELOW DOES NOT DESIGNATE THE FEDERAL DISTRICT COURTS AS MEDICAL REVIEW BOARDS FOR PHYSICIANS IN CORRECTIONAL INSTITUTIONS.

Petitioners' second issue is based completely on a presupposition of the central issue of this lawsuit. They state:

> If a complaint which stipulates that the inmate has seen several doctors on numerous occasions and that these doctors have diagnosed his injury

and prescribed treatment does not warrant summary dismissal, no complaint will.

Petitioners' brief, p. 18. As has been discussed above, there is nothing in Gamble's complaint to indicate that any diagnostic tests whatsoever were conducted for his back injury or that the diagnosis in his medical record was put there by a doctor.

A. The adequacy of medical treatment in prisons is subject to Eighth Amendment scrutiny.

Petitioners' second point is a thinly veiled attempt to return to the hands-off or prison deference rule of *Lawrence v. Wainwright, supra,* which rule has been thoroughly discredited and rejected. In *Newman v. Alabama,* 503 F.2d 1320, 1329 (5th Cir. 1974), the Fifth Circuit held:

> . . . [T]his court has been cognizant of the fact that deference which shields officials engaging in intemperate action and which excuses judicial myopia is incompatible with our role as arbiters of the Constitution and hence cannot be countenanced. Thus, while obedient to our limited function in passing upon prison complaints, we have not been impervious to the need to fetter prison officials where constraints are constitutionally appropriate. For example, in Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968), we remonstrated that once an individual is incarcerated, "any further restraints or deprivations in excess of that inherent in the sentence and in the normal structure of prison life should be subject to judicial scrutiny." And we amplified these concerns in Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972), observing that:

> "Whatever may be the outer contours of the 'prison discipline rule,' it is apparent that the courts cannot close their judicial eyes to prison conditions which present a grave and immediate threat to health or physical well being. . . . If 'the deprivation of basic elements of hygiene' has consistently been held violative of constitutional guarantees . . ., then certainly practices which result in the deprivation of basic elements of adequate medical treatment, particularly such deprivation as immediately threatens life and limb, would be equally vulnerable."

The basis of the Fifth Circuit's decision in the present case was not a disagreement with what may have been done by the prison doctors but a need to find out what, in fact, the doctors did do. The Court did not prescribe a course of medical action, as petitioners allege (Petitioner's brief, p. 18). The only thing which the Court did, was to find that under the facts alleged in Gamble's petition it was not clear beyond doubt that Gamble could prove no set of facts in support of his claim which would entitle him to relief. *Haines v. Kerner, supra.*

Petitioners' second point in their brief extends to an absured degree the concept that a difference of medical opinion does not constitute a cause of action under 42 U.S.C. §1983. Their mistaken version of the rule would deny a prisoner-patient his cause of action if he *ever* saw a prison doctor. Under this approach the federal trial court would have to dismiss even claims such as that in *Robinson v. Jordan,* 494 F.2d 793 (5th Cir. 1974). In *Robinson,* the prisoner complained of rectal pains and a digital examination was made. The prison doctor diagnosed the problem as hemorrhoids and

prescribed suppositories. For six months the pain persisted but the prison doctors refused to take x-rays and continued to prescribe suppositories. Finally, it was determined that the prisoner had advanced rectal cancer and a colostomy was performed. The Fifth Circuit rightfully held that although *Robinson* did receive diagnosis and treatment he had stated a Section 1983 cause of action. Under petitioners' rule, Gamble will have to come into court in a wheelchair as a paraplegic before he will be recognized to have even stated a claim against the Texas prison system.

B. "Flood of litigation" arguments must be rejected when the claim is made that a protected constitutional right has been seriously infringed.

The essence of petitioners' second issue appears on page 19 of their brief where they cite *Procunier v. Martinez*, 416 U.S. 396, 405 n. 9 (1974), for the proposition that allowing complaints such as Gamble's to survive summary dismissal will cause a flood of litigation in the courts. One should note that in *Procunier* the Supreme Court *affirmed* a finding that censorship by prison officials of direct personal correspondence and a ban against attorney-client interviews conducted by law students violated the constitutional rights of the prisoners. It is also interesting to note that immediately following the language quoted by petitioners, Justice Powell went on to say:

> As one means of alleviating this problem [courts being swamped with matters of prison administration and reform], the Chief Justice has suggested that federal and state authorities explore the possibility of instituting internal administrative procedures for disposition of inmate grievances.

416 U.S. n. 9. Such procedures will be discussed later in this brief.

This same "flood of litigation" argument was raised before this Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In his concurring opinion, Justice Harlan stated:

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetry inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

403 U.S. at 411. Presumably, even petitioners would not deny that "the adequacy of . . . medical treatment [in prisons] . . . is clearly subject to Eighth Amendment scrutiny." *Gates v. Collier*, 501 F.2d 1291, 1302 (5th Cir. 1974). Such an issue cannot be avoided on the basis of a "flood litigation" argument.

C. The overburdening of the federal district courts with cases such as Gamble's would be alleviated by upgrading the medical programs of the state prison systems and by instituting within the state prison systems programs such as that in the federal prison system to distinguish between meritorious and non-meritorious claims of inadequate care.

The overburdening of the federal curts with prisoners' complaints is a very real problem and it was addressed by Justice Clark and Judges Goldberg and Ainsworth during oral argument and in their written opinion in this case.

> Federal courts have traditionally been reluctant to interfere with the administration of prison systems, especially those of the states; nevertheless we note that there has been a steady increase of cases in the federal courts involving attacks on the medical, as well as the disciplinary, procedures followed in prisons. While the bench has time and again suggested that administrative procedures be established to handle complaints such as the one that Gamble presents here, the response from the the states has been minimal. As a result, we are obliged to hear and and decide such cases under somewhat broad constitutional principles.

Gamble v. Estelle, supra, at 940.

On the one hand, the State of Texas is responsible for Gamble's claim being in the federal courts because of the inadequate medical care its prisons gave him and because of its failure at that time to establish an administrative procedure which might have given Gamble relief or screened his case out if it was in fact frivolous. On the other hand, the state then comes

before the federal courts and asks that Gamble's summary dismissal be upheld because there are simply too many cases like it for the Attorney General's office to handle. This is no solution.

In his report on the Federal Judicial Branch – 1973, Chief Justice Burger stated:

> There is one area of litigation in the district and circuit courts that must be carefully examined to determine whether other and better methods may be available. Twenty years ago complaints filed in federal courts by prisoners in state prisons were hardly enough to give any concern. In fiscal 1972, there were more than sixteen thousand petitions of various kinds filed challenging the validity of the conviction even after full review by other courts. In addition, prisoners have filed more than four thousand cases under the Civil Rights Act claiming mistreatment or denial of rights.
>
> . . .
>
> . . . The thousands of prisoners complaints filed in federal courts get there by using statutes and procedures intended for quite different purposes but so broadly drawn by legislators or construed by the courts that the umbrella of the law seems to cover them. I do not suggest at all that federal courts deny protection. What I suggest is that we use some common sense and devise procedures that give prompt attention to valid complaints without calling on eleven federal judges and a train of other public employees to deal with three dollars worth of cigarettes.
>
> . . .
>
> Let me suggest just a few alternatives that we could consider with profit:
>
> 1. Create a statutory administrative procedure for federal prisons to provide for hearing prisoner

complaints administratively within the prison and require that these procedures be exhausted before any proceeding could be filed in federal courts. I believe many states would follow the federal example.

2. Establish informal grievance procedures in the state systems to hear prisoner complaints as a good many enlightened prison administrators have long since done. The American Bar Association commission dealing with correctional problems continues its important work, and I commend the subject of prisoner grievances to its attention.

3. Federal judges, acting within their existing authority, should consider referring habeas corpus and civil rights cases brought by prisoners for preliminary consideration by a United States magistrate sitting as a special master and reporting to the court.

Burger, *Report on the Federal Judicial Branch–1973*, 49 A.B.A.J. 1125, 1128 (1973).

One month after the Chief Justice's address, the Federal Bureau of Prisons instituted on a pilot basis an Administrative Remedy Procedure at the United States Penitentiary, Atlanta, Georgia, and at the Federal Correctional Institutions at Danbury, Connecticut, and Tallahassee, Florida. Norman A. Carlson, Director of the Federal Bureau of Prisons, has written:

> Under this procedure, inmates may file a written complaint with the warden, obtain a receipt for the filing and receive a written response within 15 business days. If not satisfied with this response, the inmate may appeal to my office, obtain a receipt for filing and receive a written response within 30 business days.

> We believe the pilot project demonstrated the procedure is responsible to inmates' complaints . . . approximately 35% of the inmates' complaints were resolved in the inmates' favor. In addition, the procedure gave the institutional staff an opportunity to review many policies and procedures.
>
> Based on the favorable experience with the pilot project, we are instituting the procedure in all Federal Bureau of Prisons institutions effective April 1, 1974.

Federal Bureau of Prisons Adopts Administrative Remedy for Prisoner Grievances, 3 PRISON L. RPTR. 154 (1974).

The Bureau's policy statement points out that this procedure "provides a written record in the event of subsequent judicial or administrative review and that such procedure will reduce the volume of suits filed and develop a fact record which will aid the courts in fair and speedy adjudication of those which are filed." 3 PRISON L. RPTR., *supra*. If such a procedure had been available in the Texas prison system at the time Gamble's complaint arose, vast amounts of time, effort, and money expended by courts and lawyers might have been saved.

Of course, if a federal inmate is not satisfied with the response to his complaint and appeal, he may file suit in an appropriate court and attach documentary proof that he exhausted his administrative remedy. 3 PRISON L. RPTR., *supra*, at 155. These procedures are now viewed by the federal courts as the same as other administrative remedies, and they *must* be exhausted before the prisoner can take his case to court. *Ross v. Henderson*, 491 F.2d 116 (5th Cir. 1974).

An almost identical program has very recently been established in Texas. The rules and regulations for the Inmate Legal Services Project were published on November 1, 1975. Under this program, as in the federal program, an inmate's grievance goes to the warden and then, if the inmate is not satisfied, it goes to the Director of the Texas Department of Corrections, W. J. Estelle, one of the petitioners in this lawsuit. If the inmate is still dissatisfied with the response, he will receive an interview with a Project Attorney Fact Finder.

These Fact Finders, who have no organizational or financial connection with the T.D.C., make regularly scheduled visits to all T.D.C. units. They receive the record of an inmate's grievance in time to review it prior to the interview. The Fact Finders are *not* the personal attorneys for the inmates, and they so advise the inmates at the outset of the interviews. The inmate is also advised that the record of the interview is available to the federal courts if litigation ensues.

The interview can have one of three results. First, the Fact Finder can advise the inmate that the grievance has no merit and should be dropped. If, in the face of such advice, the inmate chooses to pursue his grievance, a different Project lawyer will be appointed to represent the inmate before the courts. This second lawyer will be the inmate's personal attorney and will be compensated out of funds provided by the Law Enforcement Assistance Administration of the United States Department of Justice. Second, the Fact Finder may determine that the warden and director rejected a meritorious grievance because the inmate did not properly present it. In this event, the Fact Finder will assist the inmate in redrafting the grievance and the

inmate may then resubmit it. Third, if the Fact Finder determines that the inmate has a valid grievance which was properly presented but rejected by the prison officials, he will so report to the Project. A second lawyer, compensated with L.E.A.A. funds, will then be appointed as the inmate's personal attorney to aid in his litigation. See TEXAS DEPARTMENT OF CORRECTIONS, RULES AND REGULATIONS AND GRIEVANCE PROCEDURES (Nov. 1, 1975).

It is, of course, pointless to speculate on what the outcome of Gamble's grievance would have been if this system had existed prior to his filing his lawsuit. One difference is certain. The complaint would have reached the district court accompanied by a well-developed record including input from both prison officials and attorneys completely independent from the prison system. Instead, the district court received only the complaint without an answer, any medical records, or anything else.

The State of Texas has taken great strides forward which should insure that no cases such as Gamble's come out of Texas in the future. All future prisoner grievance suits should be accompanied by a record when they reach the district court. Petitioners' "flood of litigation" arguments have now lost whatever validity—if any—they may have once had in Texas.

The implementation of the Inmate Legal Services Project is a recognition of the complete inadequacy of the previous system of which Gamble is a victim. Gamble must now have his day in court to have the opportunity to develop the kind of record which *all* Texas inmates can now develop through the Inmate Legal Services Project. The Court's decision in this case

will be vital to the constitutional rights of prisoners in states which have not yet established such enlightened review procedures.

In summary, the Fifth Circuit did not designate federal district courts as medical review boards. It simply found that under the facts alleged in Gamble's complaint it was not clear beyond doubt that Gamble could prove no set of facts in support of his claim which would entitle him to relief. Petitioners seek a return to the prison deference rule and to bar federal courts from reviewing the adequacy of medical treatment in prisons. This argument has long ago been rejected, as has the "flood of litigation" agrument when the claim is made that a protected constitutional right has been seriously infringed. Finally, the federal prison system and the Texas prison system have recognized the need for dealing with cases such as Gamble's *before* they reach the courts. Gamble is in court, and he must now be allowed to develop the kind of record which would allow the informed and fair reading which his petition did not receive when it was filed *two and one-half years ago.*

III.

THE FIFTH CIRCUIT WAS CORRECT IN TAKING JUDICIAL NOTICE OF THE WOEFULLY INADEQUATE CONDITION OF MEDICAL CARE IN THE TEXAS PRISON SYSTEM.

A. The Fifth Circuit did not determine any ultimate issue based on the condition of medical care in the Texas prison system.

While respondent Gamble strongly urges that the Fifth Circuit was correct in taking judicial notice of the condition of medical care in the Texas prison system, this Court need not consider this issue because any error which the Fifth Circuit may have committed was harmless. 28 U.S.C. §2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Petitioners complain of the Fifth Circuit's consideration of the Report of the Citizens' Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature (hereinafter "Advisory Committee Report") (appendix to Gamble's Fifth Circuit brief). However, petitioners do not even argue that consideration of this report affected the outcome of the case or prejudiced their substantial rights. In fact, on page 15 of their petition for certiorari, petitioners state that the Advisory Committee Report was irrelevant to the present case. In the absence of any complaint by

petitioners of prejudice to their substantial rights, this Court should not even consider petitioners' third issue.

The opinion below states:

> Moreover where the general medical services afforded by the State in its prisons are publicly known to be "woefully inadequate," the court must exercise the highest degree of care to make certain that a prisoner is not deprived of his federally secured constitutional right to medical care.

Gamble v. Estelle, supra, at 940. The Court cited the Advisory Committee Report as but one example of this public knowledge. Federal courts must *always* exercise "the highest degree of care" to insure that prisoners are not denied that degree of medical care guaranteed by the Constitution. This duty of vigilence is neither heightened nor diminished by public knowledge of the inadequacies of the prison system in question. Thus, there can be no serious contention that the Fifth Circuit's reliance on the Advisory Committee Report played any part whatsoever in the decision in this case. Where petitioners themselves do not contend that an act of the circuit court prejudiced their substantial rights and where it is clear from the record that the act played no part in the circuit court's decision, this Court should not consider any complaints as to said act.

B. This Court and the Fifth Circuit may take judicial notice of "legislative facts" in arriving at their decisions.

If this Court should choose to determine whether the Fifth Circuit should have considered the Advisory

Committee Report, respondent urges that the Report was properly before the Fifth Circuit and is also properly before this Court. Furthermore, the Final Report of the Joint Committee on Prison Reform, 63d Texas Legislature, December 1974 (hereinafter "Joint Committee Report"), the contents of which are discussed later in this brief, is also properly before this Court.

In their petition for certiorari (p. 14), petitioners attack the Fifth Circuit's consideration of the Advisory Committee Report on the grounds that the Report was hearsay and that it was not presented to or litigated before the district court. Indeed, *nothing* was litigated before the district court and only Gamble's complaint was presented to it. However, petitioners' objections completely ignore the power of an appellate court to take judicial notice of relevant reports of public bodies even where such reports were not introduced at trial.

In *Stasiukevich v. Nicolls,* 168 F.2d 474, 479 (1st Cir. 1948), the court held:

> The official report of a legislative or congressional committee is admissible in evidence in a judicial proceeding, as an exception to the hearsay rule, where the report, within the scope of the subject matter delegated to the committee for investigation, contains findings of fact on a matter which is at issue in the judicial proceeding. . . . Indeed, the court could properly take judicial notice of the report, without its formal introduction into evidence.

Not only official reports of public bodies, but also their records which are public documents may be judicially noticed by an appellate court although there was no formal proof of such records in the trial court. See

Interstate Natural Gas Co. v. Southern California Gas, 209 F.2d 380, 385 (9th Cir. 1953); *Fletcher v. Jones,* 105 F.2d 58, 61-62 (D.C. Cir. 1939).

The Advisory Committee Report's cover letter to the Joint Committee states:

> . . . [T]he Advisory Committee was appointed by the Joint House-Senate Legislative Committee to examine the Texas Department of Corrections, survey citizen views throughout the state and report its findings and recommendations. Our Report responds to this mandate.

Appellant's Fifth Circuit Brief, p. A-1. Thus, the Advisory Committee was appointed by the Joint Committee; its Report is both a public document and a part of the records of a legislative committee; and, therefore, under the above cases the Fifth Circuit was free to take judicial notice of the Report. This Honorable Court has for decades taken judicial notice of reports from Congressional committees. See *State of Arizona v. State of California,* 283 U.S. 423, 454 (1931).

C. Medical care in the Texas prison system is "cruel and inhumane . . . causes unjustifiable pain and suffering to inmates . . . [and] sometimes results in needless death or crippling disease or injury."

The above quotation comes from the Advisory Committee Report. Appellant's Fifth Circuit brief, p. A-7. Gamble presented this Report to the Fifth Circuit rather than the Joint Committee Report for the simple

fact that the latter had not yet been published on the date the brief was filed.

The facts, comments, and conclusions of the two reports are almost identical. The Joint Committee Report states:

> . . . [P]hysicians, TDC officials, and inmates participate in the delivery of medical care. Since only two full-time physicians are employed by TDC currently (a maximum of three have been employed by TDC during the Committee's study), each prison unit's medical care program is supervised by a TDC official with a military background in paramedical service. First aid, diagnosis of the severity of an inmate's complaint, and administering limited forms of medication are among the primary duties of the medical assistant. The inmates assisting in the medical care program often have broad responsibilities. Inmates assist the medical assistant during the day and also substitute for him during the night. Staff research has produced evidence that inmates are given much latitude in performing minor surgery, in providing general surgical assistance, and in administering medicine.
>
> . . .
>
> The Walls hospital [where Gamble was located] is a several hundred bed health care unit which is designed to provide care for seriously ill or injured inmates who cannot be cared for at the unit level. Operated by Dr. Ralph Gray, M.D., and administered by Captain Lloyd Driver, Walls unit medical captain and X-ray Technician, the hospital has been labeled as a "fire trap" by the Texas Hospital Association. Although as much as possible is done to maintain high standards of professionalism and sanitation, problems with insect and rodent control, inadequate toilet and shower facilities,

food preparation, record keeping, and emergency procedures abound. For example, the hospital has no evacuation procedure in the case of a fire and the crowded wards and wings do not permit adequate escape routes.

All nursing capabilities are the function of inmates who are able and willing to contribute their services. No formal training is available for inmate nurses, although an informal system of training by experience has seemed to function adequately. Unofficial inmate responsibilities include administering medication and injections. The "chief resident" and the "head nurse" of the hospital are both inmates who alternate twelve hour shifts seven days a week. The degree of responsibility which they are afforded is a good indicator of the necessity TDC places on its inmate staff.

. . .

Immediate improvements of both the unit and hospital levels are necessary for delivery of adequate health care services. Program design and facilities are both outdated and in need of review and restructure. A recent court action ordered the Alabama prison system closed for failure to provide adequate medical programs for the inmate population. Texas faces similar inadequacies and should take steps to reconstitute its health care system along more professional lines.

Of utmost concern is the glaring need for more doctors and trained medical personnel. While both TDC medical assistants and inmate nurses presently provide what seems to be adequate paramedical assistance, they are not substitutes for physicians. When one considers that two physicians are the only full-time physicians serving TDC's over 17,000 inmate population, one must seriously

question the priorities of the TDC administration. The American Correctional Association's medical service standards calls for a minimum of one physician and one psychiatrist for every prison unit housing over 500 inmates and an additional physician for every 500 to 1000 additional inmates. At this level of staffing, TDC should have nineteen more full-time physicians and thirteen more full-time psychiatrists.

. . .

The Diagnostic medical examination is too brief to adequately determine the needs of the incoming inmates. During much of the period in which the Committee staff was researching the medical program one doctor was conducting the over-500 per month physical examinations of incoming inmates (as well as operating the Walls hospital). An increase in medical personnel–specifically physicians–would provide some immediate solutions to the inadequacies of the Diagnostic process.

. . .

The Walls hospital is obviously the most essential part of TDC's medical program and needs the most restructuring. The THA reports on the Walls hospital severely criticized the hospital's sanitation and structure. From operating room deficiencies to use of available space, the THA report specifically indicated needed areas for improvement which include almost every aspect of the hospital's operation. The Committee recommends that the Walls hospital either be totally abandoned and a new facility built, or that the hospital be remodeled and expanded. The Committee does not feel that this suggestion is inconsistent with its recommendation that "construction or expansion" of new prison facilities be halted. Medical services, particularly hospital services, are a necessary and presently inadequate

function of the prison system and should be immediately brought up to acceptable standards.

Restructuring and sanitizing the Walls hospital are not the only reforms which are necessary. The medical equipment which is in use in the hospital is, in some cases, outdated, and, in other cases, unsafe. For example, the operating rooms are cooled by window unit air conditioners, a practice which is blatantly in violation of the Texas Hospital code. The intensive care ward has no heart monitoring equipment for heart attack victims, a basic device in any modern hospital. TDC should actively petition the Legislature for funds to be used specifically for providing the Walls hospital with adequate equipment and supplies.

Joint Committee Report, pp. 54-57.

The section of the Advisory Committee Report cited by the Fifth Circuit dealt with the terrible shortage of trained and competent medical personnel. *Gamble v. Estelle, supra,* at 940-941. As can be seen in the above quotation, these same figures were presented in the Joint Committee Report.

When a central issue in a case is the medical care received by a prisoner, and the only evidence before an appellate court is a *pro se* complaint by the almost illiterate prisoner, it is entirely proper and, perhaps, even mandatory for the court to examine proper evidence of the quality of medical care at the institution where the complainant is incarcerated. Judicial notice is not limited to trivial or peripheral matters. To the contrary, an appellate court can and should take judicial notice of facts which are absolutely decisive in a case if such facts are subject to judicial notice. See *United States v. City of Jackson,* 318 F.2d 1 (5th Cir. 1963).

In summary, petitioners argue that the Advisory Committee Report was irrelevant and hearsay but they do not allege that their substantial rights were prejudiced by its consideration. If it was irrelevant and no prejudice occurred, then there was no reversible error. Respondent Gamble contends that the Advisory Committee Report was a proper public document for judicial notice by the Fifth Circuit, and that both that Report and the Joint Committee Report are properly before this Court. Further, in order to better understand and interpret Gamble's somewhat rambling and occasionally confused narrative, it is essential that the appellate courts utilize all available information on the quality of medical care in the system to which Gamble was subjected.

CONCLUSION

J. W. Gamble alleges that his Eighth Amendment guarantee against the infliction of cruel and unusual punishment has been violated by the petitioners who have exhibited deliberate indifference toward Gamble's medical needs. Justice Blackmun, while on the Eighth Circuit, wrote the following about the Eighth Amendment:

> The scope of the Amendment is not "static." It "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."
>
> . . .
>
> . . . [W]e have a flat recognition that the limits of the Eighth Amendment's proscription are not

> easily or exactly defined, and we also have clear indications that the applicable standards are flexible . . . and that broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable.

Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

One standard of decency in our society which has undergone dramatic evolution in recent decades is health care.

> The American system of health care has made revolutionary strides. . . . The horse-and-buggy doctor has been superseded by platoons of specialists armed with new equipment, new drugs, and new techniques. . . .
>
> . . .
>
> Revolutionary changes have also occurred in the *financing* of health care services. . . . [E]ach of these and other innovations in turn have made an increasingly broad range of health services available to an increasingly large proportion of the civilian population. Comprehensive health care is thus no longer a privilege of the few; it is rapidly on the way to becoming a right to which all are entitled.
>
> . . .
>
> . . . [T]he right to medical care is *not* one of the rights of which [prisoners] have been deprived by judicial sentence, and . . . the only care available to them is the care provided by the correctional system.

E. BRECHER AND R. DELLA PENNA, HEALTH CARE IN CORRECTIONAL INSTITUTIONS 1, 2 (1975). There can be no excuses for deliberate indifference toward the medical needs of a prisoner. It is unconstitutional and must not be countenanced.

J. W. Gamble has alleged a refusal of diagnosis and treatment and a series of incidents which constitute deliberate indifference to his medical needs. All he now asks is the opportunity to prove the truth of his allegations.

PRAYER

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be in all things affirmed.

Respectfully submitted,

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